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Canada. Secretary of State, Dept. of the

COMPANY CAPITALIZATION CONTROL

16

REPORT

UPON

EXISTING LEGISLATION

IN

CANADA AND ELSEWHERE

PREPARED BY

THE UNDER SECRETARY OF STATE

Department of the Secretary of State
of Canada

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OTTAWA

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1913.

OTTAWA, December 15, 1913.

To The Honourable LOUIS CODERRE,

Secretary of State of Canada.

SIR,—I have the honour to transmit to you, herewith, a collection of Statutes and other documents relating to the control of the capitalization of companies, together with a Memorandum in which I have endeavoured to explain the sources of such legislation and documents, and have included as many criticisms as were available for the purpose of affording information upon their objects.

I have the honour to be, sir,

Your obedient servant,

THOMAS MULVEY,

Under Secretary of State.

INDEX

	PAGE.
Letter of transmission	iii
Memorandum of the Under Secretary of State.....	vii
Public Utilities Companies.....	vii
Ontario Legislation.....	viii
Quebec Legislation.....	x
Nova Scotia Legislation.....	xiii
Manitoba Legislation.....	xiv
Imperial Legislation.....	xv
Memorandum from Mr. Knox, K.C.....	xviii
United States Legislation.....	xxix
Mr. Draper Lewis' Opinion.....	xxxii
Mr. Roemer's Opinion.....	xxxv
Mr. Hughes' Report.....	xxxviii
Interstate Commerce Commission Report.....	xl
Model Bill, Civic Federation.....	xlviii
New York Legislation.....	xlviii
Wisconsin Legislation.....	xliv
Mr. Whitten's Paper on valuation by New York Commission.....	1
U. S. Senate Committee Report.....	lxiii
Hadley's Report.....	lxiv
U. S. Constitutional limitations.....	lxvi
Commercial Companies.....	lxvii
Kansas Blue Sky Law.....	lxviii
Louisiana Legislation.....	lxxiii
Wisconsin Legislation.....	lxxiv
Indiana Blue Sky Law Vetoed.....	lxxiv
Illinois Legislation.....	lxxviii
Board of Supervision.....	lxxix
Board of Trade Report.....	lxxx
Imperial Legislation.....	lxxxiv
Cases on Imperial Act.....	lxxxiv
New Jersey Legislation.....	xciv
Shares without the dollar mark	xcvi
Appendix A. Ontario Legislation.....	3
B. Quebec Legislation.....	6
C. Nova Scotia Legislation.....	7
D. Manitoba Legislation	26
E. Standing Orders British House of Commons.....	47
F. British Model Bill.....	58
G. National Civic Federation Summary.....	74
H. National Civic Federation Model Bill.....	107
I. New York Legislation.....	143
J. Wisconsin Legislation.....	163
K. Reports of New York Public Utilities Commission First District.....	173
re <i>Kings County Electric Light and Power Company</i>	173
re <i>Third Avenue Railroad</i>	185
re <i>Third Avenue Railroad Bond holder case</i>	228
re <i>New York and North Shore Traction Company</i>	235
re <i>South Brooklyn Railway Company rates</i>	255
re <i>Westchester Street Railroad Company</i>	260
re <i>Third Avenue Railroad Bond Application</i>	293
re <i>New York Railways Company Car barn bonds</i>	301

	PAGE.
re <i>Mid-Crosstown Railway Company Bonds</i>	315
re <i>Erie Railroad warrants</i>	337
re <i>The Delaware and Hudson Company Mortgage</i>	339
re <i>Erie Railroad Bonds</i>	341
re <i>Binghampton Light, Heat and Power Company shares</i>	343
Appendix L. United States Senate Report on valuation of property of carriers....	345
Act of Congress directing valuation.....	414
M. Hadley's Report	418
N. Constitution of State of Arizona.....	439
O. Blue Sky Law of Kansas.....	443
P. Louisiana Legislation	462
Q. Wisconsin Legislation.....	463
R. Illinois Legislation	467
S. Board of Trade Report.....	470
M. Clunet's memorandum	476
Mr. Schuster's memorandum.....	480
T. Imperial Companies Act.....	488
New Jersey Legislation	507
V. New York Legislation.....	510
Shares without the dollar mark.....	

OTTAWA, December 1, 1913.

MEMORANDUM FOR THE SECRETARY OF STATE OF CANADA.

1. Under your instructions, and as requested by the Hon- Preliminary.
ourable the Minister of Justice, I submit herewith a collection
of legislation and other documents respecting the control of
the capitalization and security issues of companies. In sub-
mitting this collection, I desire to add some comments thereto,
for the purpose of explaining the sources from which I have
obtained the documents set out in the appendices.

2. The instruction directing the preparation of this collec- Classes of
tion made no reference to the class of companies to be con- companies.
sidered, and for that reason I think it is advisable to refer to
the capitalization and security issues of all classes of companies.
There are, however, two main classes of companies and they
require quite different treatment. This division is scarcely
logical, but it is sufficiently exact for the purposes of discussion.
These classes are as follows:—

a. Companies for the purpose of operating public utili-
ties or franchises;

b. Commercial, manufacturing or mercantile com-
panies.

3. In all discussion of company legislation heretofore had, Purposes of
the first class is discussed for the purpose of protecting the discussion.
public, the consumer, the individuals with whom the company
deals. The second class, however, is discussed with respect
to the protection of the shareholders and creditors. It may
be that the shareholder and creditor require protection in the
public utility company, but the necessity for this is very
unusual, and the protection of the public is very seldom re-
quired with respect to the second class of companies, because
competition is not limited.

PUBLIC UTILITIES COMPANIES.

Dominion
Public Utility
Companies.

4. In discussing public utility companies from a Dominion standpoint, and comparing the legislation of various foreign countries and States with respect thereto, it must be well borne in mind that the class of public utility companies under consideration, subject to Dominion legislation, is very largely limited. Railways and telegraph and telephone companies need not be considered. They are subject to the Railway Commission, and Dominion legislation with respect to these companies is not under discussion. Moreover, the public utilities subject to restrictive legislation in many States include many utilities which in Canada are subject to Provincial legislation, and these must also be eliminated from the discussion. Federal legislation upon the subject may in fact be limited to companies operating canals, docks, harbour improvements, navigation, ferries, and all public utilities where the operations of the company are carried on in more than one Province. These would include tramways, electric light plants, waterworks systems and many other similar utilities taken from the jurisdiction of the Province, because of their extending to more than one Province.

5. While the subject matter of Dominion legislation controlling public utility companies must be applicable only to the companies above described, a very great deal of light may be thrown on the subject by the discussion of foreign legislation upon all classes of public utilities.

Control
of rates.

6. The capitalization and security issue of public utility companies is usually sought to be controlled, more particularly for the purpose of controlling rates. Therefore the question of control of rates is a subject which must be dealt with to some extent. The capitalization and security issue are also controlled by the valuation of the assets of the company. This introduces a subject which has received a great deal of discussion in the United States, and this report would not be complete without dealing with it to at least some extent.

Valuation
of utilities.

DOMINION LEGISLATION.

No Dominion
legislation.

7. There appears to be no legislation whatever of the Dominion upon the subject of the control of capitalization and bond or other security issues of companies.

ONTARIO LEGISLATION.

Former
legislation.

8. For many years past there has been Ontario legislation upon this subject, limited, however, to the General Road Com-

panies Act, the Timber Slide Companies Act, the Act respecting Joint Stock Companies for the Construction of Piers, Wharves, Dry Docks and Harbours, and an Act respecting Joint Stock Companies for the Erection of Exhibition Buildings. These Statutes provided that the company should not be incorporated until the capital stock had been subscribed to an amount deemed adequate for the construction of the proposed work. This, while perhaps originally intended to prevent companies from being launched without adequate capital, also gave Departments of the Government authority to supervise the capital issue. These Statutes made no limitation upon the borrowing power of the companies or the other securities which may be issued. The Act respecting Joint Stock Companies for supplying Cities, Towns and Villages with Gas and Water expressly limited capitalization and also the borrowing power of the companies. All these Statutes were repealed and consolidated in the Companies Act of 1907, 7 Edward VII, Cap. 34, and that legislation has been carried down to the revision of 2 George V, Cap. 31, Part XII, Appendix A, page 3. Appendix "A."

9. This Statute appears to be wide enough to cover all public utilities subject to the Provincial legislation. As in the former legislation, the capital is subject to scrutiny by the Provincial Secretary, apparently for the purpose of establishing that the capital is sufficient. However this may be, it gives the Provincial Secretary complete control over the authorized capital of the company. On the application for incorporation a detailed description of the plant, works and intended operations of the company, and an estimate of the costs are required to be filed. It must be shown that the municipality in which the company intends carrying on business approves of the undertaking. If an existing plant is intended to be taken over, a detailed valuation thereof must be submitted. For the purpose of considering each application, the Provincial Secretary may require further statements and evidence, and may obtain the assistance of engineers, valuers and other experts. The Letters Patent incorporating the company may limit the term of its existence, the rate of dividends payable and the amount which the company may borrow upon securities of all kinds, and the rate of interest thereon. Under this Act the Provincial Secretary acts as an adviser of the Crown. He is, therefore, not subject to the control of the Courts, and there is no appeal from his decision, except to the Lieutenant Governor in Council. Companies to which this part of the Act is applicable are required to make special returns to the Provincial Secretary, showing the cost of the works, plant and Ontario Act.

Control by
Provincial
Secretary.
Plans to
be filed.
Consent of
municipality.
Valuation.
Limitation
of dividends
and borrowing.
No appeal.
Returns of
Public Utility
Companies.

the amount of capital, and the amount paid thereon, the amount received for tolls and charges, and the rate of dividend for the period of the return, the amount expended on repairs, and a detailed description of the extensions and improvements and further works to be undertaken. This appears to be the first Canadian legislation upon the subject of public utilities, and it is probably also the first legislation upon this continent covering the whole subject of public utilities and their control. This Statute, however, seems to be rather the embryo of advanced legislation upon the subject, as it contains the necessary elements for future development. How this legislation has been acted upon, and the manner in which control of public utility companies has been exercised by the Provincial authorities is not shown by any Governmental report, and it is difficult to say to what extent the legislation meets the purposes for which it was intended. Intention to disregard this legislation is apparent from the legislation of the last session, which re-enacts the Timber Slide Companies Act repealed by the Act of 1907, and for which Appendix 'A' was intended to be substituted in so far as it related to the capital stock or security issues and limitation of the borrowing powers of such companies.

QUEBEC LEGISLATION.

Company
clauses.

Appendix "B."

Stock
watering
and stock
dividends
prohibition.

Defects of
article.

10. The Joint Stock Companies General Clauses of the Revised Statutes of the Province of Quebec, Article 5974, contains some provisions respecting capitalization which are worthy of consideration. This Article is shown in Appendix 'B,' page 6. The article appears to be particularly directed against stock-watering, stock dividends and the issue of shares which are not represented by legitimate and necessary expenditure, or not represented by an equivalent in cash paid into the treasury of the company. The article appears to be very direct, and apparently meets many difficulties in simple language. It seems, however, that the very directness and simplicity of the language have defeated its object. Stock-watering, no doubt, has a very well-defined meaning in the public mind, the mind of 'the man in the street,' but its application is very indefinite, and notwithstanding the very precise wording, the clause is very readily evaded. Moreover, it is not unlikely that the article itself creates in practice greater difficulties than those it was intended to remedy. The penalty provided by the latter part of subsection 3, 'any such issue shall be null and void,' appears to be very crude and drastic. The subsection of the Companies Act corresponding to subsection 6, requiring,

apparently, all shares to be paid for in cash, was under consideration by the Privy Council in the case of *Larocque v. Beauchemin*, 1897, A.C. 358, and it was held that payment of shares by the transfer of property was a sufficient payment to comply with the section, and that the valuation placed upon such property by the directors was not subject to review by the Courts. This is in accordance with the English decisions, as shown in *Spargo's Case*, L.R. 8, Ch. 407, and *Fothergill's Case*, L.R. 8, Ch. 270, both of which were considered in the year 1868. In the *Larocque v. Beauchemin* case, there is a definite reference to the decision in the *Spargo's Case*, as follows:—

‘It was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of this provision . . . If a transaction resulted in this, that there was on the one side a *bona fide* debt payable in money at once for the purchase of property, and on the other side a *bona fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case*, L.R. 8, Ch. 270, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other, the shares have been paid for in cash Supposing the transaction to be an honest transaction, it would in a court of law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this court sitting in a winding-up matter. Of course, one can easily conceive that the thing might have been a mere sham or evasion or trick to get rid of the effect of the Act of Parliament; but any suggestion of sham, or fraud, or deceit seems to be entirely out of the question in this case, because everybody in the company knew of the transaction, every shareholder of the company was present and was a party to the resolution; there was no deceit practised on any creditor, nor was there any registration of these shares, except as shares paid up. This seems to me to dispose of the case.’ ‘It is a general rule of law,’ added Mellish L. J., ‘that in every case where a transaction resolves itself into paying money by A. to B. and then handing it back again by B. to A., if the parties meet together and agree to set one demand

against the other they need not go through the form and ceremony of handing the money backwards and forwards.' Even if this line of argument were less convincing than it appears to their Lordships to be, they would not be disposed to disturb an authority which has been accepted and acted on for more than twenty years.'

Similar
legislation.

11. The defects of such Statutes as the one under consideration are very fully discussed and referred to by Arthur W. Machen, Jr., of the Baltimore, Maryland, Bar, in his Treatise on the Modern Law of Corporations. This work is one of the most authoritative published in the United States, and I believe it to be worthy of very great weight.

'797. *Statutes requiring payment in Cash*.—What amounts to *Payment in Cash*.—Statutes requiring shares to be paid for in cash, either absolutely or conditionally,—that is unless certain requirements and conditions are met,—are sometimes encountered in America. Probably they should receive the same construction in respect to the meaning of 'payment in cash' as the English Companies Act of 1867. A cheque on a bank in which the drawer has sufficient funds may be accepted as cash but the law seems to be different if the drawer had no sufficient funds to his credit, even though the cheque if presented would have been honored. Of course, the subscriber's own promissory note cannot be deemed money; the giving of a note is really not payment, but rather a deferring of payment.'

'798. *Statutes forbidding Issue of Shares except in Exchange for Money, Property, or Services*.—A not uncommon statutory provision in the United States—sometimes even embodied in state constitutions—is that shares shall not be issued except in exchange for money, property, or services. Such provisions would seem to add little or nothing to the law as laid down in England under the Companies Act of 1862 in respect to what will constitute payment for shares. They have been construed in a multitude of not altogether harmonious decisions. An additional provision that all 'fictitious increase of stock' shall be 'void' is troublesome and dangerous. Statutes of this class are either useless or pernicious. If construed conservatively, they are scarcely more than declaratory, and are therefore superfluous; if construed loosely, they are less tolerable than the evils they were intended to remedy.'

'799. *Statutes requiring Recording of Contracts for Payment for Shares otherwise than in Cash*.—The expedient of requiring the recording of contracts for the issue of shares otherwise than subject to payment of their full amount in cash has heretofore been but seldom resorted to in the United States. Such a provision is contained in a recent Massachusetts incorporation law. A somewhat similar law has long been in force in Maryland, but has received a very different interpretation

from the Companies Act of 1867. By requiring agreements for payment of shares otherwise than in cash to be recorded, freedom of contract is preserved, while at the same time the evils of 'watered stock' are reduced to a minimum. Similar statutes are not unlikely to be enacted in other states.'

12. There can be no doubt that if a company deliberately proceeded to carry out a transaction expressly prohibited by the article, the transaction would be illegal. But it is not to be thought of that business men would attempt such an un-businesslike method when the same transaction may be carried out with strict legality. The result, therefore, appears to be that the usual method of stock-watering—padding the purchase price—is not illegal under this article. The provision that no stock shall be issued to represent the increased value of any property may also be readily evaded by the issue of cash dividends to be returned to the company for a new issue of shares. Stock dividends are expressly prohibited. In practice such a prohibition is readily evaded.

Evasion
of article.

13. Article 5988, which confers borrowing powers makes no provision for control either of the amount of a security issue or the discount at which it may be placed.

Borrowing
powers.

14. In the Province of Quebec, Article 718 of the Revised Statutes of that Province, 718 to 768, provide for the Quebec Public Utilities Commission. These sections, however, authorize no control over the issue of shares or securities of public utility companies. These articles were amended in 1911, by 1 George V, Second Session, Cap. 14, but no provision was made respecting the issue of shares or securities.

Quebec
Public Utility
Commission.

NOVA SCOTIA LEGISLATION.

15. A Board of Public Utility Commissioners was established in the Province of Nova Scotia in 1909 by 9 Edward VII, Cap. 1. Under that Statute authority was given to the Commission to supervise the issue of shares or securities. By 2 George V, Cap. 64, the Statute of 1912, the Act of 1909 was amended. These Statutes were repealed by 3 George V, Cap. 1, the Public Utilities Act, which will be found in Appendix 'C,' page 7. This Statute follows very closely similar legislation in various States of the United States. By section 82, all securities payable in more than a year, and share issues, are to be subject to the approval of the Commissioners. By sections 23 and 25 the Commission may at any time make a valuation or re-valuation of the property of the utility. By section 26, Valuation.

Public
Utilities
Commission.

Appendix "C."

Control of
issue of
shares and
securities.

Valuation.

Accounts.	page 14, utilities are required to keep such accounts and make cash returns as are required by the Board. Under section 31, page 15, the Board may audit and examine the books and accounts of a utility. By section 32, page 15, a depreciation account is required to be kept, and section 35, page 15, provides for the method of expending any amount to the credit of such fund. The orders of the Board are enforced by being made Rules of the Supreme Court of the Province. There is
Depreciation account	an appeal on questions of jurisdiction of the Board and of law, on leave being obtained. Provisions are made for control of tolls and rates. It is as yet too soon to expect definite information respecting the working of this Act, but I have no doubt that it will be administered very similarly to a corresponding Statute of the State of New York, and the reported decisions of the Commissioners in that State, to which I shall hereafter more particularly refer, will indicate the methods to be pursued.
Appeal.	

NEW BRUNSWICK LEGISLATION.

Public
Utility
Commission.

16. In New Brunswick, a Board of Public Utility Commissioners was established by 10 Edward VII, Cap. 5, 1910. This Statute, however, contains no provisions whatever respecting the control of the issue of shares or securities. The Act was amended in 1911 by 1 George V, Cap. 55, but no further authority respecting shares and securities was conferred upon the Commissioners.

MANITOBA LEGISLATION.

Public
Utilities
Commission.
Appendix "D."

Control of
capitalization.

Limitation of
capitalization.

Sales, loans
or mortgages.

Transfer
of shares.

Accounting.

17. The Public Utilities Act of the Province of Manitoba, 2 George V, Cap. 66, provides for the appointment of a Public Utility Commission, Appendix 'D,' page 26. The issue of shares and bonds or other evidence of indebtedness payable in more than a year is subject to the control of the Commission—Section 23 (e), page 33. The capitalization of a corporation franchise, a capitalization of a franchise in excess of the amount actually paid therefor, and the capitalization of contracts for consolidation, merger or lease are prohibited—Section 23 (f), page 33. The Commission has also jurisdiction over any sale, lease, mortgage or other sale or disposition of the property of the company—Section 23 (g), page 34. The transfer of shares from one public utility company to another is also prohibited—Section 24, page 34. Subsections (d) and (e) of Section 21, page 32, provide that the Commission may require a uniform method of accounting by public utility com-

panies, and the companies are required to furnish annual returns of their financial operations. The Commission may also require a company to carry a depreciation account whenever in the judgment of the Commission it may be reasonably required for the protection of shareholders, bond holders or creditors, and the Commission may ascertain and determine and by order in writing after hearing fix proper and adequate rates of depreciation of any public utility. Under Section 20 (b), page 31, the Commission may from time to time appraise and value the property of any public utility. The Commission is declared to be a court, and there is no appeal therefrom on questions either of law or of fact except questions of jurisdiction of the Commission, and then only with leave. These provisions very largely follow similar provisions of the Statutes of the United States, and comments upon the United States' Statutes will throw considerable light upon the corresponding law of the Province of Manitoba.

Returns.

Depreciation
account.

Rates.

Valuation.

Commission
a Court.
Appeal.

18. There are no other Statutes of other Provinces relating to the operation and control of public utilities, or the control of the issue of shares or securities of such companies.

LEGISLATION OF THE UNITED KINGDOM.

19. In the United Kingdom, the incorporation of public utility companies is by special Act of Parliament, and all rules and regulations therefor are contained in the Standing Orders of the House of Lords and House of Commons, and in the practice which has grown up thereunder. The Orders of the House of Commons which are sufficient for the consideration of the subject are set out in Appendix 'E,' page 47. With possibly very few exceptions, the public utility companies which are here under consideration come within the Second Class of Private Bills referred to in the Rules and Orders. Very precise regulations are laid down for the filing of plans and estimates, and the giving of notice to various parties interested in the Bill. There is a limitation placed upon the right of such companies to create mortgages, and the commentaries upon the Rules show that an estimate of the probable business expected to be done by the undertaking is required also to be filed. It will also be noticed that there is nothing in the Rules to indicate that the capitalization is based upon the estimates directed to be filed, or that the rates have any relation to the probable earning power and profits of the company as based upon the probable business done. For the purpose of clearing up these doubts, I requested Mr. Frederick Colson, an officer

Rules of
Parliament.

Appendix "E."

of this Department, who was taking his holidays in London, England, to make inquiries from the Clerks of the Private Bills Committees of the House of Lords and House of Commons. Unfortunately, however, his visit was during the recess of Parliament, and he was unable to get in touch with any of those officials, but he obtained through Messrs. C. Russell & Company from Mr. Vesey Knox, K.C., a prominent Parliamentary Counsel, a statement respecting the practice of Parliament upon the subject. My letter to Mr. Colson asking him to make the inquiries is here set out, as Mr. Knox's report is based upon this letter. In Exhibit 'F,' page , will be found such sections of the Model Bill referred to in Mr. Knox's letter as are necessary for a consideration of the subject dealt with.

Appendix "F."

OTTAWA, September 4, 1913.

DEAR MR. COLSON,—

I understand that you are going to London, while on your holidays, and I should be glad if you would make some inquiries for me from the Clerk of the Private Bills Committee of the House of Commons, or from such other official as may be able to afford you the information desired.

I am making for the Minister of Justice a compilation of all statutes and regulations respecting control of the capitalization of companies. There is a great deal of legislation and many regulations upon the subject in the various States of the United States, but we naturally turn to the United Kingdom for precedents upon this as well as any other subject. My inquiries relate more particularly to what are known here as public utility companies, that is, companies to operate public franchise. The companies in the United Kingdom are incorporated by special Act of Parliament, and the Standing Orders of the House of Commons afford some information on the subject. It is, however, the practice of the Committee of the House of Commons which has the most important bearing on the subject, and this is not disclosed in the Standing Orders.

I shall refer to the Standing Orders of 1906, which I understand are now in force. At page 51 (Appendix 'E', page 47) you will find the clauses classifying the bills referred to. The companies in which I am interested are chiefly those of the second class. Turning to Rules 35 to 37 (Appendix 'E,' pages 50-51), inclusive, you will find that an estimate of the cost of the undertaking of the company, together that a statement of the capital, and the methods of division into shares, is to be filed as provided by the Orders. By Section 56 (Appendix 'E,' page 51), the estimates are to be signed in a particular manner. By Rule 153 the loaning and mortgaging powers of the company are limited. By Section 159 (Appendix 'E', page 55), the

Committee on every railway bill fixes the maximum rates of charge for conveying passengers. By Section 166 (a) (Appendix 'E,' page 56), the rates and charges for merchandise traffic may be fixed. You will see, therefore, that there are three elements provided for by the Rules which are of paramount importance in considering the matter with which I have to deal: (a) an estimate of the cost of the undertaking; (b) capitalization; (c) mortgaging and (d) fixing rates. What I desire to know is whether there is any relation, and if so, what, between the estimate brought in and the capitalization allowed. The text books commenting upon the Rules also refer to an estimate of the traffic or business to be carried on by the company. At the present moment I cannot lay a finger upon a Rule to this effect, but I should also like you to inquire whether if such an estimate is required it is for the purpose of fixing the rates for service.

Putting my inquiries in the form of questions, they are as follows:—

(a) For what purposes is the estimate of the cost of the undertaking used in the deliberations of the Committee? Is the capitalization of the company fixed thereby?

(b) Is an estimate also made of promotion, financing and future working, and these considered in the capitalization?

(c) If authority is given by the Act to raise money by way of mortgage or debenture issue, is the amount thereof considered in fixing the share capital? If it is, is a provision made for financing the loan, by allowing such discount as the financial market may make necessary? If such a discount is allowed, is there any provision for amortizing the debentures to the extent of the discount, that is to say, is there a provision for a reserve fund to redeem the amount of the discount during currency or at maturity?

(d) In fixing the rates to be charged the public, is the probable future business estimated? Are these rates fixed with regard to dividends and interest charges?

Yours truly,

THOMAS MULVEY,

Under Secretary of State.

FREDERICK COLSON, Esq.,
Department of State,
Ottawa.

MEMORANDUM FROM VESEY KNOX, Esq., K.C.

CAPITALIZATION, &C., OF PUBLIC COMPANIES.

In order to make intelligible my replies to the questions put by the Secretary of State it is necessary first to explain shortly the machinery of Private Bill procedure.

Routine of
Private Bills.

Private Bills have to pass through the same stages in both Houses as Public Bills, but most of those stages are formal, and the duty of checking over-capitalization rests largely on the officials. The formal stages are specified in the Standing Orders. The Standing Orders are altered from time to time, and are reprinted annually. I send herewith for the information of the Secretary of State a copy of the Standing Orders as last reprinted. The Standing Orders of the two Houses are similar but not identical. In this memorandum the Standing Orders of the House of Commons are referred to unless where those of the Lords are specifically mentioned.

Standing
Orders.

Deposit of Bill.

The normal Session of Parliament begins in January or February. During the preceding Autumn the promoters of a Private Bill have to give various public and individual notices by dates and in a manner specified, and on the 17th December they have to deposit the Bill itself (S. O. 32). (Appendix 'E', page 49).

Examination
of Bill.

The Bill is then considered by two classes of officials.

The 'examiners' go carefully into the proofs of compliance with Standing Orders and report whether all the notices have been duly given, whether the provisions of the Bill are within the notice, and whether the relevant Standing Orders have been duly observed. Their duties are technical and formal. They have nothing to do with the capitalization, and their only duty as to the estimate is to see whether it has been duly deposited and whether a money deposit of the prescribed percentage of the estimate has been made.

Procedure.

The Lord Chairman in the House of Lords, assisted by his Counsel, and the Chairman of Committee of Ways and Means or his deputy in the House of Commons, assisted by the Counsel to the Speaker, separately and independently examine every Private Bill with a view to seeing whether in form and in substance it complies not merely with the Standing Orders but with the practice of Parliament and with what may be called the principles of sound legislation.

The duty of the Chairman of Ways and Means is expressed in S. O. 80 (Appendix 'E', page 62), while that of the Lord Chairman remains unwritten. In fact however until very recent years the main work of the detailed examination of Bills

was done by the Lord Chairman in the House of Lords and his Counsel. The Lord Chairman was less occupied by work on Public Bills than his colleague in the House of Commons, and was more sure of the support of his House in any case where his decision was objected to. He was in effect absolute in such matters as those under discussion. It was and is his practice to go through every Bill carefully and to return it to the Parliamentary agent with his observations. The agent then attends upon him at a private hearing and endeavours to meet the criticisms. If the agent cannot remove the objections of the Lord Chairman he has to agree to alter or withdraw his Bill.

The Lord Chairman issues annually in the Autumn a *Model Bill*. 'Model Bill', or collection of clauses, to which Bills are required to conform unless there is some good reason for a modification. The 'Model Bill' may be said to embody, so far as it goes, the practice of Parliament. A copy of the last edition is sent herewith. (*See Appendix 'F', page 58*).

The revision of Bills by the authorities of the House of Commons has recently become more thorough than it used to be. This is probably mainly due to the fact that the present Counsel to the Speaker was, prior to his appointment, a Barrister in leading practice at the Parliamentary Bar, who has a very complete knowledge of principle and practice. Counsel to the Speaker is also a member of the Committee on Unopposed Bills (S. O. 109), and is often called in to advise Committees on opposed Bills.

The authorities of the two Houses frequently consult one another, and there is no great divergence between their requirements. Their consideration of Bills is simultaneous and precedes the Committee stage in the first House.

It will therefore be seen that the Bill has been carefully considered before it reaches the committee stage, and Committees are often content (unless fresh objections are pointed out by opponents) to accept the Bill with such amendments as may have been previously formulated to satisfy the authorities. But there is no rule on this matter. It depends on the knowledge, experience, and temperament of the Chairman of Committee to which the Bill is referred.

I now proceed to reply to the detailed questions asked:—

(a) *The deposited estimate and other checks upon over-capitalization.*

The practice of requiring estimates to be deposited is a very old one. In 1774, on account of many bubble canal projects then brought forward, promoters were required to annex to their Petition for a Private Bill an estimate of the expense, together with a list of the subscriptions for carrying the work into execution (see Clifford's History of Private Bill Legislation, vol. II, page 774), and such an estimate is now required in the case of all Bills to authorize new works of the 2nd class

Checks on
Capitalization.

(S. O. 56 and 36) (Appendix 'E,' page 51). though the list of subscriptions has been abolished and a deposit of a percentage on the estimate substituted. The distinction between 1st class and 2nd class Bills referred to by Mr. Colson is not very logical. Bills for electric supply, for gas, and for railless trolley vehicles are in the 1st class, and no estimate need be deposited. Bills for canals, docks, railways, tramways and waterways are in the 2nd class. The estimate governs the amount of money which must be deposited under S.O. 57 (Appendix 'E', page 52) (5 per cent on the amount of the estimate) and this is its primary purpose. In the case of waterworks the estimate need give no details; the engineer merely certifies that the works proposed to be authorized by the Bill will cost a certain sum. The estimate only includes the initial works and does not include subsequent gradual expenditure in laying distributing mains.

Estimates.

An estimate of the expense of the works proposed to be authorized by a railway, tramway, canal, dock, or harbour Bill has to be made in a form specified by S. O. 37 (Appendix 'E,' page 51). This estimate is a more detailed estimate of the cost of the land and permanent fixed works. Though the purpose of the estimate was to govern the amount of the deposit, it is considered in arriving at the capitalization. But the fixed works are only one of the items to be considered. Other items are:—

- (1) The cost of rolling stock and equipment;
- (2) Interest allowed to be paid out of capital (see Model Bill, page 21, Appendix 'F,' page 63);
- (3) The cost of underwriting the capital or otherwise financing the undertaking.

It is necessary for the promoters to satisfy the authorities of the House and the Committee that the total of these items is approximately the same as the total of the share and loan capital proposed to be authorized. It used to be a rule of thumb that the share capital of a railway should be about the amount of the deposited estimate, leaving the equipment, &c., to be paid for out of the debentures, but in the case of many enterprises, such as electric tramways, this rule is not applicable.

Unopposed Bills.

In the case of unopposed Bills, or Bills only opposed in order to obtain clauses to protect private interests, these matters are mainly dealt with by the officials. The defect of this procedure is that neither the Lord Chairman nor the Chairman of Committee of Ways and Means has any independent engineering advice to enable him to check the estimates and they have to rely on the good faith of those who act for the promoters. The opponents to a Railway or Tramway Bill may, however, raise objection to the estimate or to the capitalization before a Committee. They may attack the estimate, and either show that it has been inflated so as to procure an undue capitalization or that it has been put too low so as to make an enterprise which is in fact hopeless appear hopeful. Com-

mittees, when such criticism is made in the petitions, permit the fullest cross-examination of the engineers and the financial promoters, and in many cases an undue capitalization has seriously prejudiced the success of a Bill. The fear of such criticism is a fairly effective check against swollen capital. It may be noted that at the time when the estimate is made the promoters cannot tell whether the Bill will be opposed and that there is danger in making the estimate either much too high or much too low. This tends to secure honest estimates. Probably estimates of recent years have been rather too low than too high.

When an existing railway company is seeking fresh capital powers for miscellaneous improvements to be carried out from time to time the check of Parliamentary sanction has not in the past been very strict. It was assumed that the company would not in its own interest raise the capital unless the money was wanted. Of recent years the conditions of the money market have furnished an adequate check, but it may be that if there were a tendency to raise capital too freely proposals for increase of capital would be more carefully scrutinized than they are now. Increase of capital.

There is another class of public service company in which the initial expenditure is only a commencement, and large capital expenditure has to be continued from time to time. The most notable case of this is a gas company, where retorts, mains, meters, and services are added as consumption increases. In this case no formal Parliamentary estimate is required to be deposited, but the promoters are required to produce before the authorities or the Committee some evidence that the capital sought is reasonable. The engineering estimate can only be definite as to works immediately contemplated, but it is the practice of Parliament to allow sufficient capital to cover probable extensions for a period of twelve to fifteen years, according to the size of the company. Gas companies.
 The engineers estimate that within that period there will be an increased sale of so many million cubic feet, judging by the experience of the company or of other companies, and that this will necessitate a capital expenditure of so much per million. Local authorities check the proposed capital of gas companies carefully, as it is customary when new capital is sought to review the conduct of the company and in some cases to revise the conditions of the concession, and they do not therefore wish the company to obtain so much capital as may keep it out of Parliament for more than the usual twelve or fifteen years. They frequently oppose Gas Bills on the ground that too much capital is sought and call expert engineers to show that the promoters' estimates are inflated. The capital is often cut down on such opposition. Engineers estimates.

The companies which have been dealt with are companies incorporated by Act of Parliament, but there are cases of tramway and gas companies incorporated under the Companies Act, 1862, or the Companies (Consolidation) Act, 1908, which Under General Companies Act.

have obtained statutory powers. In these cases the capitalization is fixed by the Memorandum of Association and can be increased without Parliamentary authority. In the case of some tramway companies this has been the cause of grave public scandal. In the case of limited gas companies the practice is to limit by Bill or Provisional Order to a fixed sum the capital on which a dividend can be paid out of the profits of the statutory undertaking, and I know of no good reason why this has not also been done in the case of tramway companies.

Electric light
companies.

Electric lighting companies obtain their powers under Acts of 1882 and 1888 by Provisional Orders granted by the Board of Trade and confirmed by Act of Parliament. Though the confirming Bill has to pass through all its stages in the two Houses in the same way as an ordinary Private Bill, the Parliamentary authorities have in fact left the practice in the matter of capitalization to the Board of Trade, and the Board of Trade have granted powers to Companies incorporated under the Companies Acts without limiting their capitalization. Thus an electric lighting company escapes the revision every fifteen years which a gas company has to submit to and there is no practical check against inflation of capital. The only reason which can be suggested for the practice being laxer in the case of tramway and electric lighting companies than in the case of gas companies, is that the former are purchaseable at fixed dates on a basis of structural value while the latter are not purchaseable except by special Act of Parliament and then on a basis of profit earning capacity. It is hard to say whether the presence of the purchase clause or the absence of strict supervision over capitalization has done most harm to English electrical undertakings. During the last ten years the unsatisfactory position of electric lighting has led to the incorporation by special acts of companies authorized to supply electric power over larger areas. These companies are not subject to any provision for purchase. In theory their capitalization is subject to the same check as that of gas companies, but in practice the difficulty of estimating the future expenditure has prevented any close check upon the capitalization.

Auction
clauses.

Any account of the checks upon capitalization would be incomplete which did not take into account the operation of the auction clauses. S. O. 188 is as follows:—

‘In every Bill which an existing gas or water company is authorized to raise additional capital, provision shall be made for the offer of such capital by public auction or tender at the best price which can be obtained, unless the Committee on the Bill shall report that such provision ought not to be required, with the reasons on which their opinion is founded.’

Reputation
of rates.

‘In the case of every such gas Bill it shall be competent to the Committee so to regulate the price of gas to be charged to consumers, that any reduction of an authorized standard price shall entitle the company to make a proportionate increase of the authorized dividend, and that any increase above the standard price shall involve a proportionate decrease of dividend.’

The auction clauses are contained in the Model Bill at pages 70, 72 (Appendix 'F,' page 73).

The auction clauses effectually prevent the inflation of the capital of successful gas and water companies by the issue of the shares at such a price as will give a bonus to existing shareholders or a profit to the financiers who control the company. They are always insisted upon and are sometimes also applied to debenture stock. Successful gas companies have thus no illegitimate reason for increasing their capital and when they do increase it, issue the new capital to the best advantage. Such a thing as a bonus by the issue of shares far below the market price is impossible. Though there is not much market for gas shares on the Stock Exchange, they have a special following of investors, and no other class of ordinary share has been issued so advantageously during the present period of high interest. The system is of course unpopular among financiers as it yields them no profit, and this is probably the chief reason why the auction clauses have not been applied to railway shares and other classes of capital for which a ready stock exchange market is considered essential.

(b) *Estimates of promotion and finance expenses.*

Estimates, though not required by S. O., are made of the cost of establishing and financing the company, where its capitalization is fixed by Parliament, and these are taken into account. These estimates are generally rather vague. As an example, in the case of the Morgan tube railway promotion, Sir Clinton Dawkins put the cost at a percentage of 8 per cent on the capital of 16 millions. Usually a rather smaller figure has been stated and a rather larger amount found to be required.

Estimates of working cost are not required by S. O. but are often given in order to satisfy the Committee that the enterprise is a reasonably feasible one, but these estimates do not affect the capitalization. Parliament endeavours to limit the capitalization to actual capital expenditure and to eliminate all allowance for good will. For instance where promoters had bought up some derelict gas undertakings, reorganized them, and promoted a Bill to incorporate a new company to take them over, the Committee fixed the price payable in shares by that new company at the sum actually paid by the promoters with the addition of any capital expenditure since made and refused to authorize any payment in respect of the good-will of the undertaking. The promoters had to take their profit out of the subsequent appreciation of the shares above par. The decision has been followed in subsequent cases, and it may be taken as established that Parliament when the matter is brought to its notice will now allow the capitalization of good-will. The same principle is reflected by S. O. 165 and 166 (Appendix 'E,' page 56), which prevent capitalization being swollen on amalgamation.

Promotion expenses.

Capitalization of intangible assets.

Holding
companies.

There is no part of the policy of Parliament against which promoters have struggled more vigorously. The device most frequently attempted was to secure an undue amount of capital by an exaggerated engineering estimate, but this is becoming more and more difficult. Another device is to form a limited company with larger capital to hold the shares of the statutory company, and to issue a second series of debentures charged on the holding company. In most cases, however, these holding companies have not been very successful in unloading on the public.

(c) *The Loan Capital.*

Limitation
of borrowing.

The S. O.'s as to loan capital are as follows:—(House of Commons S. O. 153, Appendix 'F,' page 54.)

'In the case of a railway or tramway Bill, a company shall not be authorized to raise, by loan or mortgage, a larger sum than one-third of their capital; or until fifty per cent of the whole of the capital shall have been paid up, to raise any money by loan or mortgage unless the Committee on the Bill shall report that such restrictions, or either of them, ought not to be enforced, with the reasons on which their opinion is founded.'

(House of Lords, S. O. 112.)

'In the case of a railway Bill a company shall not be authorized to raise by mortgage or debenture stock a larger sum than one-third of their capital; or until fifty per cent of the whole of the capital has been paid up, to raise any money by mortgage or debenture stock.

'In the case of a tramway Bill a company shall not be authorized to raise by mortgage a larger sum than one-third of their capital, or, until fifty per cent on the whole of the capital has been paid up, to raise any money by mortgage.'

For many years the House of Lords rigorously insisted on this proportion of three-fourths share and one-fourth loan capital in every case save one, viz., railways in Ireland. Irish railways were allowed to raise one-third of their total capital by debentures in consideration of the greater difficulty of selling their ordinary shares. Railway companies which were embarrassed resorted to various devices, of which the most common was the creation of 'Lloyd's Bonds.' They were prohibited from borrowing more than x . But if they owed a further sum y for stock or works they were legally bound to pay it. They issued a bond in payment which was a mere acknowledgment of indebtedness. In the result they owed x to the persons who had lent money and y to the persons who had paid for works. Lloyd's Bonds were not authorized by Parliament, but they have never been prohibited. They were not usually issued by companies in good standing except in case of temporary difficulty.

Of recent years, however, Parliament has made this evasion less usual by authorizing the company in case of need

to create a greater proportion of prior obligations than that fixed by the standing orders. Sometimes this is done by creating a subsidiary company and authorizing the principal company to take a lease of the undertaking. Thus the Immingham Dock was constructed by the 'Humber Commercial Dock Company,' and the Great Central Company took a lease at a rent sufficient to pay a fixed interest on the capital expended. The rent is a fixed charge on the Great Central undertaking. The Great Central Railway and some other companies have also been authorized to create additional debenture stock without issuing fresh shares, on the ground that shares could only be issued at a ruinous discount.

It may, however, be still said that English railways are more restricted in their borrowing powers than any other railways, and that the debentures do not in most cases exceed one-fourth of the total money raised. In the case of gas companies the rule, so far as I know, is absolute. In the case of electric lighting companies the Board of Trade have not thought fit to place any limit on the bonded indebtedness.

It will be understood that, where the borrowing power is strictly limited, it should not in most cases be necessary to allow any considerable discount on the issue of debentures, and in practice it is usual, in fixing the capitalization, to assume that the whole amount of the debentures will be raised at par, less a modest underwriting commission.

There is no provision for amortizing the debentures to the extent of this commission. In fact the debenture stock of a statutory company is irredeemable (see Companies Clauses Act, 1863, Sections 22 *et seq.*). It is a fixed perpetual charge on the profits of the company. Considerable doubt has been felt as to whether companies have gained, in the issue of the stock, any advantage to compensate them for the absence of the power of discharging their indebtedness when the credit of the companies had improved.

Amortization
of debentures.

It may be added that doubt is felt as to whether Parliament should not have required reserves for amortization or otherwise, but the real difficulty is that the companies which have most dead capital have the least means to amortize it. In the case of gas companies the amount which may be carried to reserve is strictly limited. See Model Bill pp. 69 and 70 (Appendix 'F,' pg. 72, 73) for the present practice. In certain exceptional cases, where companies for various reasons were weighted with a very heavy capital charge, clauses have been inserted requiring the provision of future capital partly out of revenue.

(d) *Fixing of Rates to be charged to the Public.*

As to railways.—So far as rates for goods are concerned the practice is to apply the schedule of rates and charges applicable to some adjoining or neighbouring railway. See S. O. 166a

Rates.

(Appendix 'E', page 56). In cases where the undertaking is exceptionally expensive, some extra charge is allowed. In most cases the matter is disposed of without much consideration. See the Model Bill page 18 (Appendix 'F,' page 62.) The fact is that since the general revision of railway rates under the Railway and Canal Traffic Act 1888 the authorities of Parliament have been unwilling to disturb the settlement then arrived at.

So far as rates for passengers and parcels are concerned S. O. 159 is as follows:—

'The Committee on every railway bill shall fix the maximum rates of charge for the conveyance of passengers with a due amount of luggage, such rates to include every expense incidental to such conveyance, and shall also fix the charges for the conveyance of parcels by passenger trains; but if the committee shall not deem it expedient to determine such maximum rates of charge, a special report, explanatory of the grounds of their omitting so to do, shall be made to the House, which special report shall accompany the report of the bill.'

Clauses in the form at pages 18 and 19 of the Model Bill (Appendix 'F', page 62-63) are usually inserted as a matter of course.

In the case of some of the London Tube Railways a lower charge was inserted. The promoters in these cases furnished estimates of receipts and expenditure, but it would be more correct to say that they offered the low fares so as to get support for their Bills than to say that the fares were fixed after an inquiry as to whether these fares would yield enough to pay interest and dividend charges. Special fares for the working classes are frequently provided for and in some cases have been resisted on the ground that they would render the undertaking unprofitable.

Tramway rates.

As to tramways.—The practice is much the same. See Model Bill, pages 60, 61 and 62 (Appendix 'F,' pages 69-70), for the clauses usually inserted. The power given to the Board of Trade at page 62 to revise fares is also frequently applied to other things, *e.g.*, charges for electric light—I am not aware, however, of any case in which this power has been exercised.

Water rates.

As to water.—Model Bill pages 85, 86 and 87. Charges vary considerably, and evidence as to probable earnings and the cost of supply are frequently given. The charge is fixed with the intention of providing interest and dividends. The dividends of water companies are limited to a certain fixed rate, and when the profits are more than enough to cover these dividends the company can be ordered to reduce its charges. This has been done in certain cases, but most of the big water undertakings are now in the hands of local authorities.

As to gas.—The system of regulating gas prices is somewhat elaborate, but as it is one of the most successful features of English Private Bill Legislation it may be useful to summarize it. The original system was like that applied to water companies. Parliament fixed the capital, the maximum dividend, and the maximum price. The Company which had reached its maximum dividend could thus gain no greater income for its shareholders by further developing its undertaking. To meet this disadvantage Parliament,

1. fixed a standard price instead of a maximum price, and

2. provided that for every 1d. of decrease of selling price below the standard price the dividends might be increased by one-fortieth above the old maximum dividend.

The clauses usually inserted to carry this system—known as the sliding system—into effect will be found at page 68 and page 73 of the Model Bill.

The practical difficulty in applying this system is to fix the standard price at a fair figure. This is usually a matter which has been negotiated between the local authority and the company, but it is often fought out before a committee. The principle applied is that the standard price should be fixed at such a figure as will allow the company, if properly managed, to pay its maximum dividend with a fair margin for contingencies. The company will get the benefit of future improvements and take the risk of a rise in the cost of materials. The standard price, once fixed, has only been altered in very exceptional cases, as for instance where it had been fixed so high that the company had never been able to earn the standard dividends, and the incentive to reduce the price had thus never began to operate. It will be noted that the consideration of Gas Bills involves a good deal of consideration of technical questions by Committees, and it is rather remarkable the members of both Houses should have been found ready to give the time for enquiries which cannot from the nature of things be exciting.

As to electric light.—The Board of Trade usually fixes one maximum for large towns and a smaller maximum for smaller places, but in practice these maxima are always so high that the price is only regulated by the competition of gas.

As to electric power.—The Electric Power Acts generally applied a sliding scale to electricity, but in most cases the standard price was fixed at so high a figure per unit that the company can never hope to earn the dividend to which it is legally entitled. The Acts also usually prescribe a scale of maximum charges, but these again were generally so high that the company would get no business if it charged anything approaching them. There are in fact inherent difficulties in regulating the price of electric supply owing to the great

variation in the cost of supply to different consumers, and it cannot be said that Committees of Parliament have got over this difficulty.

The provisions of the licenses granted to the Victoria Falls Power Company in South Africa, by which the customers participate in the surplus profits after these reach a certain dividend, are perhaps more suggestive than any of the provisions to be found in English Acts of Parliament.

Dock rates.

Dock and Harbour charges are usually fixed at such a figure as is expected to secure a due return on the capital expended or to be expended. Sometimes they are the subject of a good deal of controversy before Private Bill Committees and there is very great diversity in the systems of charge. More often the Bill in question has been promoted by a dock company or authority seeking to be allowed to increase its charges so as to enable it to find the money necessary for extensions or improvements, for in fact dock charges have usually been too low to give a very profitable return on the investment. A recent important example was the case of the Port of London Authority. Under the old constitution of the ports there was a due on ships to pay the cost of dredging the channel and dues on goods shipped or unshipped over the dock quay, but no due on goods shipped or unshipped at wharfs or from ships in dock overside from or into barges. The new port authority was authorized to promote a provisional order to levy dues on all goods shipped or unshipped in the port, whether in the river or in the docks, and Lord St. Alwyns held an enquiry on behalf of the Board of Trade into the proposed charges. The charges were fixed on such a basis as would give the Authority an adequate additional revenue. The principles applicable are the same in the case of a company and a representative authority.

Speaking generally, it may be said that Parliament does try to fix the rates of charge for public services at such a figure as will give the promoters an adequate but not excessive return on their capital. But the inherent difficulties in the case of new undertakings are very great. Traffic estimates are proverbially unreliable. As a rule the expert who frames them endeavours to show a return sufficient to enable the capital to be found, but not more than sufficient, lest the Committee should be disposed to load the undertaking with onerous terms. Committees can get little guidance from such evidence and probably the provisions which have been inserted for the public protection are due as much to the bidding of sanguine promoters for popular support as to the deliberate policy of Parliament. Happily promoters are usually sanguine.

VESEY KNOX.

Palace Chambers,
Westminster, 29th Sept., 1913.

THE UNITED STATES.

22. The subject of the control of capitalization and security issues of public companies, the control of rates, and the valuation of the undertakings of public utility companies, have received wide and serious consideration throughout the United States. With the exception of the States of Wyoming and Utah there is legislation in every State on some of these subjects. Exhibit 'G,' page 74, is a summary of this legislation in so far as it relates to capitalization and security issues in the States therein referred to, and collects the legislation under the different topics dealt with. The compilation was prepared by the National Civic Federation of New York. This organization is presided over by Mr. Seth Low, formerly Mayor of the City of New York, and is composed of many of the most public spirited citizens of the United States. Among its most important objects is that of urging uniform State legislation on those matters that are intra-State, to make for the co-ordination of State with Federal legislation where conflict now exists, and to aid in securing Federal legislation on inter-State matters that are concededly in the interest of public welfare. This compilation should therefore be received as authentic. It refers, of course, only to such legislation as includes regulations controlling capitalization and bond issues. Since the compilation was printed, similar legislation has been passed in the following States:—

Exhibit "G."

National
Civic
Federation.

District of Columbia: Section 8 of Public Acts of the United States, No. 435, approved March 4, 1913, which created a Public Utilities Commission;

Recent
legislation.

Illinois: Public Utilities Act, which went into effect 1st January, 1914;

Indiana: Act creating Public Utilities Commission, approved March 4, 1913;

Missouri: Act of 47th General Assembly approved March 17, 1913, creating 'The Public Service Commission of the State of Missouri';

Pennsylvania: An Act recently passed creating the Public Service Commission, giving control over rates, capitalization and security issues;

Nebraska: State Railroad Commission created by Chapter 108 of the laws of 1909 with control over issue of shares and bonds.

23. These Statutes follow prior legislation referred to in the compilation, and it would merely burden this Report to

refer to them in detail. On account of the larger number of States which have regulations respecting the control of capitalization and issue of bonds it should not be assumed that the enactment of these regulations has been passed taking for granted that their provisions are in all respects wise, and that they will ultimately attain the objects for which they were passed.

States not
controlling
capitalization.

24. The following States have legislation creating railway commissions, public utility commissions and other similar boards for the regulation of public utilities, but have no provisions for the regulation of the issue of shares or bonds:—

Alabama: Section 5632, Code 1901 and amendments;

Arkansas: Act, March 11, 1899, amended by Act April 15, 1899, Section 1;

Colorado: Act, November, 1910;

Connecticut: Act creating Public Utilities Commission, approved 11th July, 1911;

Delaware: Act creating Public Utilities Commission for City of Wilmington, March 29, 1911;

Florida: Chapters 6186-6187, Acts of 1911;

Idaho: Act creating Public Utilities Commission, approved March 13th, 1913;

Indiana: Act creating Public Utilities Commission, March 4th, 1913;

Iowa: There is various legislation in this State, commencing in 1888 appointing a Board of Railway Commissioners, down to An Act of 1907 specifically giving power to fix rates without control of shares or securities;

Kentucky: Railway Commission has power to fix freight and passenger rates. No control over securities or share issues;

Louisiana: Railway Commission appointed by Act 16 of the laws of 1900;

Minnesota: The Railroad and Warehouse Commission has jurisdiction over railroads and express companies, but not over the issue of shares and securities;

Mississippi: Railway Commission has jurisdiction over railroads, express, telegraph and sleeping-car companies, but not over the issue of shares and securities;

Montana: The Act of February 26th, 1907, created a Board of Railway Commissioners, but it gives no jurisdiction over the issues of shares and securities;

Nevada: The Public Service Commission has no jurisdiction over the issues of securities or shares;

New Mexico: Corporation Commission has no control over shares or bond issues;

North Carolina: The Corporation Commission was created by Chapter 164 of the Public Laws, 1899. It has no control over the issue of shares or securities;

North Dakota: Has a Board of Railway Commissioners, without authority over share or bond issues;

Oklahoma: The Corporation Commission was created by Section 15, Article 9, of the Constitution of 1907:

Oregon: The Railway Commission was created by Chapter 279 of the laws of 1911;

South Carolina: The Railway Commission was established under Section 2063 *et seq.* of the Civil Code, 1902, and the Public Service Commission by Act No. 286 of the Statutes of 1910;

South Dakota: Has a Railway Commission without jurisdiction over bond or security issues;

Tennessee: Railway Commission created by Chapter 10 of the laws of 1897;

Virginia: State Corporation Commission has control over Public Service corporations, but has no jurisdiction over issue of shares or securities;

Washington: Public Service Commission created by Statute of 1911, without jurisdiction over shares or securities;

West Virginia: The Public Service Commission Act passed 29th February, 1913, went into effect 31st May, 1913.

25. It therefore appears that in 22 States of the United States the issue of shares and securities are subject to control, in 25 States they are not in two there is no legislation on the subject.

26. It is difficult to ascertain the precise reasons for this difference in policy upon which some States give their Commissions authority over the issue of shares and bonds and others have not. One important expression of view, however, is contained in a memorandum prepared by Mr. Draper Lewis, Dean of the Law School of Philadelphia, and a very prominent jurist of the State of Pennsylvania. This memorandum is in effect the preface of a Draft Public Service Commission Law

Difference
of policy.

Mr. Draper
Lewis's
opinion.

of the State of Pennsylvania brought forward by the Progressive party of that State in a recent political campaign. It should, however, be pointed out that, notwithstanding Mr. Lewis's representations upon the subject, the Statute as subsequently enacted contains provisions for the control and regulation of capitalization and bond issues.

27. Mr. Draper Lewis's memorandum:

'SPECIAL NOTE on omission from this proposed Act of any provision giving the Commission power over the issue of securities by public utilities; the consolidation of or the sale or leasing of their property and franchises.

Draft
Pennsylvania
Act.

'The proposed Act does not give the Public Service Commission created under it any power over the character of the company owning the utility, the method by which such ownership may be acquired, or the way in which such company procures funds for the acquisition, equipment and operation of its plant. This omission is a departure from the Public Service Commission Acts of Wisconsin, Ohio, New York, Kansas, Maryland, California and New Jersey. In these States the Commission is given absolute power to prevent the sale, lease, mortgage, or other disposition of the property and franchises if the Commission believes that such sale or lease is unwise; a holding company or another public utility cannot acquire the stocks, bonds, or other evidences of indebtedness of the owning or operating company without the consent of the Commission, and the Commission's consent is also necessary to the issue of stocks, bonds, notes or any evidences of indebtedness payable at periods of more than twelve months after the date of issue.

'The Committee in submitting the present draft was aware that many persons whose experience and study of the subject gives weight to their opinion, believe that it is important that the Public Service Commission should be given this power. The sub-committee in charge of the preparation of the Bill desire to state here some of the reasons which led them to recommend the Committee to omit these provisions from this first tentative draft, taking this occasion to emphasize our desire for criticism and suggestion.

Rates
depend on
service.

'First: We feel that the object of this Act is to secure reasonable service to the public from public utilities at reasonable rates, and that this object can be best secured by confining the attention of the Commission to the elements of reasonable service and of reasonable rates. So long as the public has control over the service rendered, and the rate of charge, it would seem to be immaterial to the public, as users of the service, who owns the utility, or by what means the funds to operate it are secured. Thus, the size and ownership of the utility, the method by which such ownership was acquired, whether the utility is an absolute owner or merely a lessee of

the works, the amount of the outstanding stock and bonds, and the quantity of so-called 'water' which they contain, has no bearing, as far as we can at present perceive, on what is a reasonable service, or what is a reasonable rate for such service.

'The fact that the public utility has been badly managed that it is loaded with bonds and other debts, and that it is therefore unable to provide a reasonable service, does not appear to be any reason why the public should not have such service. If the utility is unable to give it, then the sooner the works and franchises by foreclosure or other sale, passes under the control of those who can give reasonable service the better.

Effect
of bad
management.

'It has been argued that the amount of outstanding securities, the stocks and bonds of a public utility, is an element to be taken into consideration in the determination of rates, and therefore the Commission should have power to regulate the issue of such securities. That the duplicable value of the property is an element in determining the reasonableness of a rate is admitted. It is also admitted that the outstanding securities are evidence of the value of the property. But they are only one kind of evidence. The Commission, unless estopped by its own act validating the security as hereafter explained, is not in any way bound by such evidence. The real value of the property as shown by a physical examination by experts is much better evidence of value than the face value of outstanding securities, and this physical valuation the Commission, under the proposed Act, has power to make.

Capital in
fixing rates.

'Again, the importance of the element of value of the property in determining the reasonableness of a rate has been and is greatly over-emphasized. A utility is entitled to earn a sufficient return to provide, not only interest on its investment, and a fund for depreciation, but it is also entitled, in an industry where the methods are rapidly changing, to set aside a fund to meet what is known as the obsolescence of its plant. On the other hand, it is not entitled to earn a return on money wasted in unnecessary buildings and extensions, no more than it is entitled to earn money on its operating expenses in as far as those operating expenses are due to an inefficiency falling below a reasonable standard of efficiency of operation.

Our estimate
of value in
fixing rates.

'Second: To give the Commission power to control all sales, mortgages, leases, purchases and issues of securities, is substituting the Commission for the board of directors of the utility, in the determination of questions pertaining to the methods by which the funds shall be secured and expended to enable the utility to fulfil its duties to the public, as those duties are expressed in the Act and laid down by the Commission. It has appeared to us that this is confusing the power of supervision to enforce a duty with the power of management, and is fundamentally unsound.

Control
of sales,
mortgages, &c.

'Third: If the Commission is given control over the issue of securities, there is a grave danger that the exercise of this

Conflict
of powers.

power will prevent the Commission's subsequently requiring a service to be performed at a rate otherwise reasonable.

'The matter is sufficiently serious when the security is issued by a utility created after the establishment of the Commission. Suppose, for instance, the Commission authorizes such an utility to issue bonds secured by a mortgage for \$100,000. Can it thereafter fix a rate for the service which will not pay interest on these bonds? It will be noted that the Commission has passed not only on the question whether the bonds have been paid for in cash or property, but on the wisdom, from a business point of view, of the issue of the security. Might it not be argued that the State, having formerly approved the issuance of these securities and thereby given them a value to the investing public, is estopped under the Federal Constitution and certainly in common decency, from any act in fixing rates or requiring service which deprives these securities of that value in the hands of those who have purchased them? By giving to the Commission two functions wholly distinct would we not be preventing either function from being performed with efficiency, and laying up for ourselves constitutional problems which could only be solved by a long series of litigations?

Approval of
prior issues.

'But the difficulties here indicated in those cases where the company is organized after the adoption of the Act are nothing to those which may follow, where public utilities already organized seek and obtain the Commission's sanction to the issue of additional securities. A single illustration will serve to illustrate the great danger which lies in conferring on the Commission such a power. A public utility now in existence may have property to the actual value of \$100,000 and outstanding securities, stocks, bonds, etc., to the amount of \$500,000. On the passage of the Act the utility needing more money for its operations asks the Commission to sanction either an increase of stock or a second mortgage to the amount of \$100,000. The Commission, recognizing the necessity for increase in its funds, sanctions the issue of bonds. Later, the question of the reasonableness of the rates charged by the company comes before the Commission. The actual amount of money invested is \$200,000. The security issued is a second mortgage, and there is a first mortgage of \$200,000. If the Commission later fixes a rate which would enable the company to earn a fair return on the value of the property, such rate might nevertheless prevent the company paying the interest guaranteed on all their bonded indebtedness, inevitably resulting in a sale under the first mortgage, which would wipe out the second.

Effect of
authorization
of issues.

'In the same way if the security sanctioned by the Commission was a \$100,000 increase of stock, when the question of the rates, charged by the utility came before the Commission, the old and new stock would have been so inextricably mixed that it would be impossible to tell the proportion of new and

old stock represented by any one certificate; and even if this difficulty could be overcome, the establishment of a rate which would give a reasonable return only on the actual capital invested might well destroy the value of the stock whose issue the Commission had expressly sanctioned. It is a grave question whether in the case put, the Commission would not be estopped under the Fourteenth Amendment of the Federal Constitution from taking any action which would destroy the value of the security, the issue of which they had sanctioned.

'The validation of a junior security, particularly if it be a bond secured by a mortgage, necessarily validates senior securities. It would seem an impairment of the obligation of the contract of the utility with the holder of bonds under the first mortgage to permit a return upon the junior bonds, the issuance of which was sanctioned by the State, and not upon the unauthorized earlier and senior bonds.

'Thus the action of the Commission in sanctioning the second mortgage or the additional stock might require the Commission to allow a rate to be paid by the public for the service which would yield a fair return, not merely on the value of the property, but also on the \$400,000 of fictitious capital and bonds outstanding when the Act was adopted. It is unnecessary to emphasize the importance of the subject here discussed to the welfare of the people of this State.

'Attention should be called to the fact that the power to veto and approve securities of public utilities was not conferred upon the various State Commissions until quite recent years, say 1907. No cases have been found involving the questions here mooted, when the Commission subsequently seeks to fix the rates of the utility whose securities have been approved. See, however, *Wilcox v. Consol. Gas Co.*, of New York (1909), 212 U. S. 19. If the uncertainty is a real one, we believe all will agree that no Act should be passed giving the Commission power to sanction the issue of securities, until it is clear that by so doing they do not estop the State regulating rates without regard to the water in existing securities. Uncertainty of methods.

'In conclusion it is important to note that in taking the position that a Public Service Commission should not have control over the stock and bond issues of public service corporations the Committee is not blind to the fact that the issuing of vast quantities of watered stock is a real and serious evil. Our doubt is whether the evil should be met in an Act creating a Public Service Commission. The Committee has, however, directed the drafting of an Act dealing with the subject.' Conclusion.

28. Mr. John H. Roemer's opinion—

Another interesting opinion was given by Mr. John H. Roemer, Chairman of the Wisconsin Board of Railway Com- Mr. Roemer's opinion.

missioners, in a letter to the National Civic Federation upon the Model Bill set out in Appendix 'H,' page 107, as follows.—

National Civic
Federation Bill.

'I have not had the opportunity of studying carefully the proposed Bill for the regulation of public utilities. However, I have some general comments to make upon the provisions relating to the issuance of stock and bonds. The more I study and reflect upon the regulation of stock and bond issues by public authorities, the more I am inclined to the opinion that my views when I redrafted the Wisconsin stock and bond law were unduly influenced by the prevailing prejudice against the sin of watered stock. In providing a remedy for this admitted evil, it is a question in my mind whether other evils are not already resulting from the scheme of supervision of stock and bond issues provided in our law, and in substance incorporated in your Model Bill, which will tend to defeat in a great measure the purpose of the Act, and will also likely embarrass, in certain instances, the Commission in performing its primary function of supervising and regulating the rates and services of public service corporations.

Watered
stock evil.

Regulation
for benefit
of investor.

'As I view the matter, the regulation of the issues of corporate securities is and must be for the benefit of the investors. It has no bearing, independent of statutory provision, upon the question of rates. The proper return upon the investment in a public utility is, under the ruling of the court of last resort, based upon the fair value of the property devoted to the public service. This doctrine, however, seems to have been somewhat modified in the Consolidated Gas Company case (*Wilcox v. Consolidated Gas Co.*, 1909, 212 U. S. 19), because of the statute of New York which authorized the capitalization of the franchises of the individual corporations which were combined. The court took the broad moral ground that the state, having authorized the capitalization of these franchises and the securities having been sold on the faith of such authorization such securities should be taken into consideration in determining the fair value of the property. It is evident that the logic of this ruling, if adhered to, must change eventually the measure of values of the property of public service corporations wherever their securities can be issued only under state authorization. Independent of statutes the issuance of corporate securities is permissive on the part of the state, and so long as it remains permissive the securities can be regarded at most as but mere evidences of value. They certainly, in such event, do not constitute the measure of value.

Fair value
basis of rates.

Capitalization
of franchises.

Responsibility
of state in
controlling issues.

'In authorizing the issuance of securities and directing the investment of the proceeds thereof, the state is assuming a responsibility which, in the very nature of things, it ought not to do. The state cannot direct the management of the corporation, and therefore, should not undertake the responsibility of authorizing the issuance of securities and directing the invest-

ment of their proceeds. By so doing it is likely to cause certain investors who purchase such securities as an investment without knowing anything of the management of the corporation or the possibilities of the enterprise, to rely upon the State's sanction of the issues. These are the investors who need protection, and who, I am apprehensive, will often be the victims of investments in ill-advised and mismanaged public service corporations whose securities have been authorized by State Commissions. The business man who deals in such securities needs no protection. In my judgment, the responsibility of issuing corporate securities and applying the proceeds of same to corporate purposes should rest with the management of the corporation, subject, of course, to general statutory restrictions and limitations.

Danger to
investors.

'Another danger to be apprehended is that as to existing corporations, the issuance of securities under such a law as is proposed may result in validating past issues. It is in most cases impossible to successfully attack the validity of original issues of stock and bonds of the older corporations even if the same were invalid for want of consideration when issued. With the passing of time, the evidences of wrong doing have been effaced, and as a result such securities rest upon a solid foundation protected by a presumption of fact which cannot be rebutted. These securities do not now measure fair property value, but may they not enter into the problem of valuation if subsequent issues should be made only upon authorization of the State? The contract between the stockholders is protected against impairment by the Federal Constitution. Not even the power reserved to the legislatures, in certain State constitutions, to amend and repeal corporate franchises, can be exercised so as to change or impair the contract between stockholders. One of the vital terms of the contract is that each share of stock of any class is equal in value to, and entitled to all the privileges of, every other share of the same class. Now, if the State puts its sanction upon any share in any class, it must logically and necessarily sanction all outstanding shares in such class. Likewise bonds issued under a trust deed are subject to like mutual covenants in the deed which cannot be impaired.

Validation of
prior issues.

'Doubtless these matters have all been considered by you, but I am firmly of the opinion that this feature of the law should be carefully considered by the Committee before action is taken.

'As a result of the experience under the Wisconsin law, I have come to the conclusion that the English Companies' Act is a much wiser measure for the regulation of the issues of corporate securities than any of the laws or proposed measures that have come to my attention in this country. If I were to draft the law again, I should be guided by the fundamental principles of that Act.

English
methods wiser.

Hadley's
report.

'In view of the fact that the Federal Government spent quite a sum of money in investigating this very subject through the Federal Securities Commission (Hadley's Report, Appendix 'M'), would it not be wise to consult the members of that Commission and obtain their views upon the provisions of the Bill relating to stock and bond issues? I am certain that the members of that Commission would cheerfully give their assistance and counsel to the Committee in this work. Mr. Frederick Strauss of the Commission resides in the city of New York. His address is No. 1 William Street. I know Mr. Strauss can give you valuable information upon this subject. His views are worthy of consideration.

'As the results of the investigation of the Federal Securities Commission are available, it seems to me that they should be utilized by the Committee in dealing with that most important feature of the law which relates to the regulation of the issuance of stock and bonds by public service corporations.'

Mr. Hughes
opinion.

29. A very strong opinion to the contrary has been expressed by Mr. O. H. Hughes, a member of the Board of Railway Commissioners of the State of Ohio, and Chairman of the Committee on Railway Capitalization in his report of that Committee to the Convention of the National Association of Railway Commissioners, 1912, as follows:—

MR. HUGHES' REPORT.

Rates
depend on
capitalization.

'It is contended that the reasonableness of rates is not dependent upon the capitalization of railways, and that the question can and must be determined by other considerations. Theoretically, this sounds plausible; practically, however, where the entire body of rates of common carriers, or a large proportion thereof, are involved, the question is not ultimately determined without a consideration of all capitalization, in whole or in part. The truth of this statement is supported by reference to the decision of the Supreme Court in the case of *Smyth v. Ames* (169 U. S., 466), where all the rates on state traffic in the State of Nebraska were under consideration. In many other proceedings where the actions of State Commissions have been called into judicial question, support is found for this statement. In such cases it is usually alleged by the carriers that the rates prescribed by the public authorities are confiscatory or not reasonably remunerative. This allegation has frequently been sustained by the process of showing: first, the gross earnings; second, the gross operating expense; third, the fixed charges, including interest on bonds; fourth, the net balance of surplus available for dividends on stock; fifth, the amount of stock, preferred and common; and, sixth, the smallness of the rate of dividend on the stock.

'In the face of proceedings and records of this kind it is idle to parade a plausible theory which is ignored in actual practice. When it is sought to apply the theory that capitalization is not a matter to be considered in ascertaining the reasonableness of rates the outcry is always made that the bonds and stocks constituting the capitalization, whether issued in good faith and upon actual investment or not, have in many instances passed into the hands of innocent holders or been purchased by savings banks and fiduciary representatives of estates belonging to the innocent, including widows and orphans, so often brought to the front in discussions of this sort; and the forceful contention is made that the public, as represented by their governments, State and Federal, has stood by and permitted the issuance of these securities. It is further contended that to ignore such securities in the fixing of transportation rates is in substance to work a partial repudiation of them; that this is harsh and unjust and that common fairness requires the public to bear the burden of making them good, rather than put upon the few who have innocently purchased them the loss incident to their repudiation.

In practice capitalization controls.

'It therefore seems that whatever may be the strict theoretical law upon the subject, good faith and good policy demand such control and supervision over the issuance of securities as will prevent over-capitalization, by watered stock, or the issuance of any form of capitalization other than for the legitimate necessary purposes of the carrier in the full and adequate performance of its public duty, and make certain that securities when issued will not be sacrificed at less than their par value in order to enrich the select few who in many cases are permitted to take them; and also that the proceeds are in fact devoted to the legitimate purposes of the public carrier.

Control required.

'Admitting, then, that there is necessity for some action upon the part of the Government which will protect the public, and the corporate properties as well, from unjust and unscrupulous manipulation, the query is: What is the right remedy to apply?

'Views are numerous and diverse as to what should and what should not be done by the Government in the exercise of the regulative power to encompass proper results.

'The legislatures of different States have been laboring over this question in recent years, while Congress has certain measures before it, as well as many suggestions from those who have given more or less unbiased thought to the subject, besides suggestions from those who have varying shades of interest to be affected thereby.

'Concretely, these several suggestions may be resolved into three propositions: (1) Absolute control of the issues by the Government; (2) modified governmental control; and (3) leaving the matter where it has always been—in the hands of the corporations themselves.

'Like all other absorbing questions, each of the three propositions has its merits and its advocates, neither one of which, however, so far as we are able to discern, can be guaranteed as a positive panacea for the ills of over-capitalization or the abuse of capitalization.

'Our desire to have regulatory measures enacted should assume definite form, and we should not, like young robins in the nest, open our mouths and swallow whatever comes, be it shingle nails or worms. We caution against the demagogues in our political life seeking personal popularity and willing to advocate or father any measure, even though it be full of 'sleepers' and loopholes or possibly anarchistic, and in the end be a public calamity, just so it meets with present popular applause. We need and must have additional legislation, but it must be sane legislation, enacted with an eye single to the ultimate good of the general public and at the same time control the evil of over-capitalization and retard, if at all, to the minimum the progress of our country and the development of its resources. Such regulation must have due regard to existing obligations and not destroy confidence.

Control of
capitalization.

'The first proposition that we shall consider is the absolute control by the Government of the future issues of corporate securities, and in that respect we may say that what we shall have to offer on that subject is applicable alike to the respective powers of the Federal and State Governments within their respective spheres, not only as applying to the railroads but with equal force to all public utilities. Of course, it is conceded that there may sometimes be a conflict of jurisdiction between the two separate sovereignties, should both attempt to exercise the same power over the same subject at the same time; but good-will and an organized effort toward harmonious relations between Federal and State powers, fighting as it were, a common enemy, with a determination that the evils abroad in the land shall not control both powers by playing upon the prejudices and jealousies that may exist or be aroused between the two sovereignties, will reduce the question of conflict of jurisdiction to a minimum. Waiving for the present this question, and confining our discussion to the general proposition, we desire our views to be regarded as applying to both. Your Committee, however, favors Federal control and voluntary Federal charters where conditions bring the subject matter within its jurisdiction, and we believe that, generally, Federal jurisdiction may be asserted. But where it may not be exercised there should be as nearly as practicable uniform State legislation, moulded after such Federal laws, so that when an interstate corporation reaches such proportions that it would engage in interstate commerce it may do so without material change of base.

Conflict of
jurisdiction.

Method
of control.

'It is the thought of the proponents of this first means of control that the Government shall exercise absolute authority

over all corporate issues of securities in the future; that before any new stock or bonds may be issued by a railway company such company, as a condition precedent, shall present its formal application to whatever authority may be designated by law, and shall set forth the amount and character of the issue desired, the purpose of the same, a detailed statement of the addition, improvement, or extension to be made (if such be the purpose), a full statement of the assets and liabilities of such company, and such other facts as may be required; the law to specify the purposes for which stock and bonds may be issued. The public authority will thereupon fix a time of hearing and fully investigate the proposed transaction and approve or disapprove the application in whole or in part. If the issue be authorized the public authority shall fix the amount found by it to be necessary for the purposes stated in the application and fix a minimum price at which such stock or bonds may be sold. Such authority shall direct the application of the proceeds to the specific purposes provided by law and set forth in the application, and cause report in detail of the expenditures so made, together with certain other facts for the purposes of public inspection and record; appropriate penalties to be provided for any departure from the order made by such public authority.

‘The second proposition contemplates that application and approval shall not be prerequisite, but that a railroad company issuing stock or bonds shall be required to furnish the national or State authority, at the time of issue, with a statement in detail as to the issue, the amount of the proceeds, and the purposes for which the proceeds are to be used, to be later followed by an accounting for such proceeds as a matter of public record, and also a full and accurate report to the stockholders of such corporation.’

Qualified
control
showing
object of
issue.

‘The third proposition speaks for itself and simply means ‘hands off’ by permitting the corporations to have the absolute control in the issuance and sale of their stocks and bonds, as in the past.’

No control.

‘Your Committee, of course, protests against the third proposition.’

‘In support of the first proposition, it is urged that such supervision would greatly reduce the growing and increasing obligations of railroads; that there would be a positive stop put upon the unscrupulous practices of security manipulators; that the initial step would not be taken in a questionable transaction which required the sanction of the public authority in the first instance; and that the public would know what moneys were to be derived from future issues, the application of the same, and have opportunity to protest in advance. To these expectations we can assent. It is claimed that the sanction by the governmental authority of the stock or bonds issued under its approval would make the same more readily market-

able and at higher values. We concede it is possible that this theory may be correct, yet it is claimed that this very authorization might be disastrous to the purchasing public, since the administrative authority can not guarantee any issue as to its value. We do not, however, believe this objection tenable.

‘There are so many other factors upon which the solvency of a corporation may depend, aside from the mere approval of its necessities for additional funds at the hands of public authority, that such approval would carry with it no guaranty as to the value of the security, and yet we submit this approval might be urged to procure a higher price and a more ready market for the issue.

‘Again, who shall want to assume to say at what price a security shall be marketed? Under normal conditions such instruments have a varying value. This variation is marked by the days, weeks, months, or the year. The value may be affected most keenly by the crops, weather conditions, money market, floods, famines, etc. The value of new issues put upon the market depends upon the character of the institution offering them. They may readily command par, and they may not be marketable at all. It may be a new enterprise whose face is unknown to the financial world, and one whose promise may not at once be flattering, while at the same time public exigency might demand the enterprise even at a sacrifice, and the future prove the wisdom of the undertaking.

‘In the mind of the general public this first proposition meets with hearty approval, and we submit that, theoretically, in view of the breach of public confidence on the part of railway companies, it would seem not only just and proper but a satisfactory solution of a vexatious problem. But upon full analysis of conditions, present and prospective, we hesitate to say that the time is ripe for legislation to such extent upon the part of either the Federal or State Government and question if less stringent laws would not bring better results.

‘The United States with its vast area is diversified in the character of its products and resources and not equally developed in all sections. The demand for railroads in many sections is very great, yet capital has not been attracted in that direction, while in other sections we find parallel and, nominally at least, competing lines equal to every need. Some States require a certificate of public necessity before a new line of railway may be constructed, such requirement arising out of the presumption that the public in that section is already provided for. We can subscribe to the requirements of the public necessity certificate, but a hard and fast rule requiring stocks and bonds to be sold at par, or fixing a minimum price at which the same may be sold is a very different proposition. If commissions were infallible, and made no mistakes, or were always in step with public needs and in close touch with the financial world, such requirement might work no particular

harm; but standing with our backs to a half century of practically unregulated transactions under governmental sanctions, as it were, and involving so great a portion of the nation's wealth, it is a long step from such condition to a condition of strict regulation approximating absolute governmental control.

'The laws of certain States provide that the bonded indebtedness shall not exceed the par value of stock outstanding, which provision has been the cause, no doubt, of much stock being sold at a sacrifice, or issued as a bonus to induce the purchase of bonds. It seems that even at this late day, in the full light of past transactions, the distinction between stocks and bonds is not comprehended. If the stockholders' equity is to be measured by the par value of outstanding stock, then stock should not be issued for less than par; but as stock represents the interest the holder has in the property, it should mean that, in fact, the original purchaser paid into the property the value which such stock represents. Stock should represent, not misrepresent, the actual cash value of the asset paid to the company and no more, whether such stock has or has not a par value. If the investment be or be not a gamble, let every man put his money on the table and take his chances. If the venture proves a success, he wins; if not, he loses. If he loses, the public should not pay the loss; and if he wins, he should be entitled to a profit commensurate with the risk, and such profit should not be measured by ordinary interest rates.

'As to bonds, there is an obligation to pay the principal at a stated period, as well as the stipulated rate of interest periodically, which interest becomes a fixed annual charge against the property, and must be paid. Dividends upon stock depend upon the earnings over and above expenses of operation, interest and taxes. The value of the equity of the stockholder in the property, after all, is measured by the cash arising from the sale of such stock and actually going into the property, rather than the par value of the stock. Par value may not, and frequently does not, mean that equivalent value has gone into the property. As a safeguard to bondholders, and as a barrier against overburdening a railroad with fixed charges, the amount of bonds issued could be made to bear some certain relation to the amount of stock outstanding; yet such requirements, when fixed at equal amounts, may work harm. It would seem that this ratio should be left to the sound discretion of the public authority controlling the issue of such securities.

'We must go on improving, developing, and extending railroads by reason of public necessity, regardless of past fictitious capitalization; neither may we take into account such fictitious capitalization in the authorization of securities for future improvements, unless it appears a hopeless task, in which event there should be a valuation of the property by public authority and a reorganization; and if such reorganization be by way

of the courts, then the courts should be bound to respect the valuation so fixed and force a reorganization on that basis.

‘In all cases of extensions, additions, acquisitions of new property, etc., to be paid for by new securities, the public authorities should ascertain the reasonable value thereof and know that the proceeds of such securities are expended for that purpose and no other. If bonds are sold below par we believe a fund should be provided to meet the difference. If the public demands an enterprise whose bonds will not bring par, the rate for service should be sufficient to in time pay the discount. Rate of return upon investments must be greater than that in less hazardous business, else railway development may come to a standstill, which condition we must avert. Even if our policy in the past has been a reckless one, it must continue for a time to be a fairly liberal one, and to a great extent a policy of education.

‘The general public is interested in the securities of our public service corporations, and the General Government as well as the several States are likewise vitally interested in the stability of such securities and the growth of railroads. This interest is paramount to that of the shipper who is interested alone in his rates or that of the bond owner who is looking with an eye single to the profit of his transaction. We feel that it is more incumbent upon the Government to manifest at this time rather its wisdom than the extent of its power.

‘The more nearly we approach absolute governmental control the more we discourage individual energy and encourage individual indifference, and as a consequence stifle development. The capitalization of railroads has gained undue impetus by our own acts of omission, and it is hardly consistent to now strike wildly at the structural integrity of our whole railway system.

‘We should not treat superficially the symptoms, but rather the seat of the disease, lest the remedy applied do more harm than good by reason of functional disorders due to our past dissipation. We should consider the problem presented, admitting its imperfections, with the view of solving it to the greatest public good. Legislation in the extreme is likely to lead to confusion and inefficient service. The germ of the obligations and duties of a corporation should be found in its charter, in which respect our laws of incorporation, generally speaking, have been at fault.

‘The errors in the history of railroad financing and management are not inherent because of the public nature of the enterprise, but incident to lack of timely legislation controlling and limiting concentration of capital. Capital should not be unduly discouraged, but encouraged to invest in railroads with a reasonable assurance of fair profit; but every investment should be a public record and open to public inspection. Even if demand should control the selling price of securities, a public

body should control the application of the proceeds. Legislation should be such that the investor may know that the money paid will go into the property and not be diverted. Well-defined legislation fixing reasonable limits of activity with efficient public supervision, publicity of all transactions affecting public interest, and official inspection of records would have a most salutary effect, with no resultant harm.

‘There are two classes of people with whom we are concerned in the matter of security issues, viz., the public, who must use the highways of commerce, and the purchaser. The company issuing the securities is supposed to take care of its own interests, which power should be interfered with only so far as is necessary to protect the other two classes. If we hold the issuing company to a strict accountability for its conduct, we have in a very large measure protected the patron and the purchaser without undue interference with the company’s internal affairs in a matter that is perhaps the most delicate of all its concerns. The responsibility for assuming, in a sense, the shaping of the financial affairs of all these great concerns is one from which a body of intelligent men would naturally shrink, especially when they contemplate the difficulties which beset men who have only one concern to direct. While additional legislation no doubt is demanded, we question the wisdom of the extreme measures contemplated by the first proposition. We are mindful of the fact that some States have already conferred this authority upon their commissions, and that that power is now being exercised, but it is likewise true that it has not been demonstrated that such grant of authority is the better policy or that the exercise will finally be beneficial to the public good.

‘If the Corporation should be required to make a report of its own transactions, showing, as the statute would require under penalties, exact facts concerning every issue of stock and bonds, and the public authority had full power to investigate all those transactions and the right to call for all the necessary records, including the interest of every director, officer, or servant in the corporation’s affairs, there would be such a check and restraint as would be a great stop-gap to maladministration. The entire responsibility for the conduct of the corporation’s affairs would still be in the hands of its officers, and those matters of internal policy would be undisturbed; at the same time the light of publicity would be so searchingly thrown upon those transactions that anything savouring of jobbery would be easily and quickly discovered and the guilty promptly punished.’

RECOMMENDATIONS OF THE INTERSTATE COMMERCE COMMISSION IN ITS ANNUAL REPORTS TO CONGRESS.

30. In its report for the year 1908 the Commission referred to the general interest of the public in the regulation of Report 1908.

railway securities and referred to the direct interest of the Commission as follows:—

Capitalization
an element
in rates.

‘The direct interest of the Commission in the matter, however, arises from the fact that Congress has made this body a tribunal when complaint is made for inquiring into the reasonableness of railway rates. It has frequently been urged that capitalization exercises no influence upon rates, but such an assertion is at best a partial truth. When one holds in mind how persistently the courts oppose the enforced approach of railway tariffs to the line of confiscation; when one comes to realize how eager the carriers are to restore to their property accounts the value of the improvements of past years paid for out of revenues; when one clearly understands that so long as railways which operate on different levels of cost continue to compete for the same traffic, there must result a permanent differential profit to the more fortunate road; and finally, when one reflects upon the fact that securities once issued are ordinarily beyond recall and beyond control, it is difficult to see how one can assert that the kind and amount of securities issued by public service industries have no bearing on the problem of railway operations, as that problem must be regarded by the Commission and by the courts. It is, in fact, the setting in which the problem is most frequently submitted for judicial consideration.

Control over
capitalization
recommended.

‘The Commission desires to avail itself of this opportunity for expressing to Congress its judgment that some adequate method of federal control over railway capitalization is required by the interests involved.’ (Page 86, 22nd annual report of the Interstate Commerce Commission.)

Report 1909.

In its report for 1909, the Commission quoted its expression of the previous year and said:—

‘The need of exercising control over railway capitalization is again urged upon the attention of Congress.’ (Page 8, 23rd annual report of the Interstate Commerce Commission.)

Report 1910.

In 1910 the Commission reasserted its belief as to the wisdom and urgent need of proper legislation for the control of railway capitalization, and added a statement as to the effect of the Commission’s accounting orders in securing a correct statement of the entire cost of property of carriers in terms of cash and the segregation of the cost of improvements paid for out of revenue. (Pages 35 to 37, 24th annual report of the Interstate Commerce Commission.)

Report 1911.

In its report for 1911 the Commission quoted from its reports above referred to and concluded as follows:—

‘In regard to the control of capitalization the above reference to previous utterances of the Commission may suffice. Pursuant to an Act of Congress the President has appointed a special commission to investigate the entire subject of rail-

way securities. We are advised that the report of the Railroad Securities Commission will be submitted to this Congress, and for that reason we refrain from a more extended discussion of this subject of capitalization in the present annual report.' (Page 94, 25th annual report of the Interstate Commerce Commission.)

The report of the Commission for 1912 refers to this Report 1912. subject in its final recommendations (page 70) as follows:—

'In previous reports the Commission has called the attention of Congress to desirable legislation on various subjects. Among others a physical valuation of railroads, a uniform classification, a more explicit definition of the authority of this Commission over telegraph and telephone lines, and control of railway capitalization. We here renew our previous recommendations without taking time to re-state the reasons already given.'

In Opinion No. 2394, being the opinion on the New England investigation, devoted primarily to the New York, New Haven and Hartford Railroad, the Commission discussing the financial operations of that railroad said, among other things:—

'No student of the railroad problem can doubt that a most prolific source of financial disaster and complication to railroads in the past has been the desire and ability of railroad managers to engage in enterprises outside the legitimate operation of their railroads, especially by the acquisition of other railroads and their securities. The evil which results, first, to the investing public, and, finally, to the general public, can not be corrected after the transaction has taken place; it can be easily and effectively prohibited. In our opinion the following propositions lie at the foundation of all adequate regulation of interstate railroads:

'1. Every interstate railroad should be prohibited from expending money or incurring liability or acquiring property not in the operation of its railroad or in the legitimate improvement, extension, or development of that railroad.

Control of
purposes of
expenditure.

'2. No interstate railroad should be permitted to lease or purchase any other railroad, nor to acquire the stocks or securities of any other railroad, nor to guarantee the same, directly or indirectly, without the approval of the Federal Government.

Control of
leases, purchases
or guarantee of
other utilities.

'3. No stocks or bonds should be issued by an interstate railroad except for the purposes sanctioned in the two preceding paragraphs, and none should be issued without the approval of the Federal Government.

Control of
issues.

'It may be unwise to attempt to specify the price at which and the manner in which railroad stocks and securities shall be disposed of, but it is easy and safe to define the purpose for which they may be issued and to confine the expenditure of the money realized to that purpose. That such a measure of regulation is necessary, and that it can only be administered

through the national government, is the necessary conclusion from the facts developed in this proceeding.'

Difference
one of point
of view.

31. From my observation of the subject, I think that the difference in view which has led to the divergence in the method of treating public utility companies with respect to capitalization and share issues is summed up in an answer made to me by Mr. John H. Roemer, Chairman of the Public Utilities Commission of the State of Wisconsin. My question was as follows: 'Why is it that you do not approve of the provisions relating to the control of capitalization and bond issues, when you are the head of a commission required to enforce such regulations? and why is it that Mr. A. (Chairman of a similar very important Commission) holds diametrically opposite views to those held by you?' His answer was in a few words, as follows: 'Mr. A. is an economist, and I am a lawyer.'

Exhibit "H."

32. Exhibit 'H' is a Model Bill prepared by the National Civic Federation for submission to the Legislatures of the various States, with the object of unifying the law upon the subject under discussion. It embodies many of the best features of existing legislation. The Bill is set out in full, as it deals with many interesting subjects as well as the control of capitalization.

STATE OF NEW YORK.

New York
legislation,
Appendix 'I.'

33. Appendix 'I' is a collection of sections from the legislation of the State of New York respecting the issue of shares and securities of railways. The Statute in question contains similar provisions with respect to capitalization and secured issues of other specified public utilities. The clauses, however, are so similar, that it is unnecessary to state them, as to do so would be very largely repetition. To these sections are added extracts from the Rules of both the First and Second Commissions under this Statute relating to the issue of shares and bonds. The First Commission deals with public utilities situated in Greater New York, while the Second Commission has jurisdiction over the balance of the State. These Rules, while covering largely the same material, are slightly different, and they are set up in full for the purpose of illustrating the methods under which these Commissions deal with the Statute. They show the details of the financial conditions of various companies which are required to be set out, the statements which have been made in petitions presented to the Commissions, and other details which indicate the method in which the

Rules.

Act is worked out. There is also added a number of forms of clauses which have been standardized for the purpose of being inserted in Orders made by the Commissions. The study of these will also add to an appreciation of the method in which the Act is dealt with.

Standard forms
of orders.

STATE OF WISCONSIN.

34. Appendix 'J' contains the provisions of similar legislation in the State of Wisconsin. These are set out in extenso because of the reputation throughout the United States of the successful operation of the laws of the State, and the efficiency with which this particular Statute has been dealt with by the Public Utilities Commission. Wisconsin was in fact the first State of the Union to adopt legislation upon this subject. Some extracts have also been added from the Rules of Procedure of the Wisconsin Commission which may add to a precise understanding of the scope of the Statute and the method in which the Commission deals with it.

Wisconsin
legislation,
Appendix 'J.'

Rules.

35. The study of the Rules of Procedure and the results of the deliberations of the Commissions appointed under these Statutes may indicate roughly the methods of dealing with the subject. But often for a close student the Statutes and Rules give only a partial insight into the method in which the Statute may be interpreted and the Rules dealt with. The Statutes and Rules are but dry bones—the skeleton—upon which the law as interpreted by the Commission may be built up. It is to the reports and opinions of such Commissions that resort must be had in order to ascertain the extent to which the provisions of such a Statute may be refined. The process of interpretation often extends the scope of such a Statute beyond what at first sight appears to be indicated, and these extensions must be discovered in the opinions and decisions which are given. For this purpose, I have set out at what may appear to be very considerable length some of the opinions of the First and Second Commissions of the State of New York, which are included in Appendix 'K,' page 173. There may be opinions of other Commissions entitled to as great weight, but these show the methods of the New York Commissions at work.

Commission
reports.

Appendix 'K.'

The first case, *re* King's County Electric Light & Power Co., p. 173, deals with an application for permission to issue debenture bonds. The method in which the Commission considered the financial dealings of public utility companies and the former history of such companies is clearly dealt with.

Re Third Avenue Railroad Company, p. 185, shows in a very complicated case how the former history of public utilities was considered by the Commission. In these and several other cases which follow questions of value are dealt with, and the refinements and details which are rendered necessary for the purpose of controlling the issue of securities are fully exposed. The third case also relates to the Third Avenue Railway. Page 228 adds further to this and has more particular interest because of its consideration of the amortization of discounts. The Westchester Street Railway case, p. 260, is well worthy of consideration. It deals with an application for the issue of shares and securities upon the reorganization of a street railway company, and considers in minute detail the valuation which should be put upon a decrepit franchise. Mr. Maltbie in his opinion considers all the decisions of the Supreme Court of the United States upon the question of valuation, criticizes the opinion of Mr. Justice Harlan in *Smyth v. Ames*, and defines clearly the meaning of the word 'valuation' as held by economists. The decisions respecting the New York Railway Company's car bonds, at p. 301, is also worthy of consideration, as showing the purpose for which bonds and shares may be issued, and the underlying valuation required therefor. I could summarize all these cases to the advantage of anyone desiring to consider them, but I earnestly commend the study of the reports for the purpose of ascertaining the full scope of legislation which places the control of capitalization of public utility companies in the hands of a Commission.

Valuation by
New York
Commission.

36. Since the last-mentioned Appendix was put in type the subject of valuation by the Public Utility Commission of the First District of the State of New York was extensively considered by Mr. R. H. Whitten, in a paper which he read before the National Convention of Railway Commissioners held at Washington, D.C., on October 28th and 29th, 1913. I take the liberty of setting out copious extracts from this paper. They summarize the conclusions reached in several of the cases above referred to, and set out compendiously the method of valuation laid down and followed by that Commission.

EXTRACTS FROM A PAPER READ BY MR. ROBERT
H. WHITTEN BEFORE THE VALUATION DECISIONS OF THE NEW YORK PUBLIC SERVICE COMMISSION, FIRST DISTRICT.

'In determining fair value for rate purposes, the decisions of the Commission do not disclose that any one rule or factor has been selected as a single standard. The underlying thought is that valuation, being a step in the determination of just compensation, the whole problem is to determine that amount which, used as a base, will at the rate of return fixed result in just compensation to the company for the service rendered. In determining the fair value as one step in the process of determining the reasonable cost of production, both actual cost and reproduction cost are considered important. Valuation for rates.

'The Commission has recognized the close interdependence of fair value, fair rate of return, and current expense and income accounting. It is actual total return that is of prime importance to both parties. This actual return is the product of all these factors. The real actual return cannot be known unless all these factors are known. The actual return is altered whenever one of these factors is altered. The interdependence of fair value and fair rate of return is the basis of the Commission's ruling as to 'going value.' The interdependence of fair value, income accounting and fair rate of return is the basis of the Commission's treatment of the appreciation in land value. It is the total actual return that is of importance. Justice, equity, and public policy demand that the company be permitted a total actual return that will be adequate, but no more than adequate, to compensate it for the service rendered. In the past attention has often been centered on valuation to the exclusion of the end for which the valuation is made, which is the determination of the total actual return for the service rendered. Fair value cannot be determined without reference to rate of return and income and expense accounting as it is the interplay of all these factors that produces the total actual return. 'Going value.'

'Actual cost is necessarily the base on which estimates of return will be computed at the inception of an enterprise. The investor risks a certain amount of money on the chance of a specified return on that amount of money. Starting with the necessary investment as a base he will estimate all the risks and hazards of the business of every kind and nature and against this will place all the possible chances of profit. The possible rate of return adequate to induce investment is naturally and necessarily a percentage on the actual cost. Actual cost.

'Cost of reproduction may vary without any change in the amount of money, or other capital outlay contributed to the reproduction. Cost of reproduction.

Analysis of
actual cost.

enterprise. Cost of reproduction is a hypothetical cost. As applied to the existing enterprise it is not cost at all. It does not represent the actual sacrifice of money or other outlay contributed to the establishment of the industry. From the standpoint of the investor, a rate of profit based on any amount that is less than the actual cost is in excess of the actual rate of profit, and a rate of profit based on any amount that is greater than the actual cost is less than the actual rate of profit.

‘It is perhaps needless to say that actual cost as a base for profit determination in a rate case must be modified by a rule that only reasonable and necessary expenses shall be included in such cost. Moreover, actual cost is subject to certain of the same limitations that exist in the case of reproduction cost. There must be deduction for accrued depreciation of every sort. Moreover, cost, either actual or reproduction, may have to be abandoned as a basis for rate making, if the plant is located in a community too small or too poor to pay a fair return on the fair cost of the service. Rates may then be regulated by the principle that, regardless of cost, the reasonable rate of charge cannot exceed the fair value of the service to the consumer.

‘Cost of reproduction seems now to be favoured over actual cost by the public utility interests as the amount on which the fair rate of return is to be applied. This is natural in view of the recent trend toward increasing costs. But the present trend may not continue indefinitely. If there should be a general downward movement, it would create a situation that would clearly prove the injustice of the cost of reproduction standard. With falling prices no one could afford to establish a new industry. The cost of reproduction would have to be discarded or progress would be blocked. Such a change in the trend of general prices does not seem imminent and as to land seems most improbable but unless the cost of reproduction method will work both ways it is clearly inappropriate. Under rising prices it is just as unfair to the public as under falling prices would be unfair to the company.

‘The only way in which the cost of reproduction method may be made to work with a degree of fairness both to the company and to the public is to so alter the fair rate of return as in a measure to offset the appreciation or depreciation of the base to which such rate of return is applied. With declining prices the risk of depreciation in reproduction cost would offset by an increase in rate of return and with advancing prices the probability of appreciation would be offset by a decrease in the rate of return. This, however, is but a poor method of accomplishing what can be more economically, fairly and logically effected by directly basing the rate of return on actual cost. Any method that is permanently fair to both parties must get back to actual cost as the base for actual as distinct from nominal profits.

Actual
investment.

‘The general practice of the Commission has been to have its Bureau of Statistics and Accounts make a thorough exam-

ination of the accounts and records of the company, with a view to determining as far as practicable the actual investment or sacrifice on the part of the company. The financial history and capitalization of the company are studied, and operating expenses for a series of years are analyzed. In none of the decisions thus far rendered have the construction accounts been in such shape as to admit of an accurate determination of the actual cost of any large proportion of the property. Consequently, much more weight has necessarily been attached to estimates of reproduction cost than would be the case if actual cost had been known. In many cases, however, records of recent construction have been secured that have been of material assistance in checking the estimate under the reproduction method for unit prices and overhead expenses. In the Kings County Lighting case (2 P.S.C., 1st Dist., N.Y., 659), the estimates of the company's experts in regard to reproduction cost were considerably in excess of those by the Commission's engineer. The Commission refers to the fact that "the company has produced no vouchers, bills or records to discredit the estimates of the Commission's engineers or to support the estimates of its own witnesses, who were repeatedly asked whether they had examined the records of cost of the company to determine whether their estimates had any direct relation to the amounts actually spent." The counsel to the company expressed the opinion that actual cost of existing property had nothing whatever to do with the amount to be considered as the fair value of the property. The Commission rejected this contention, especially in view of the fact that the New York law requires the Commission in determining gas and electric rates to "consider all facts which in its judgment have any bearing upon a proper determination of the question. . . . with due regard among other things to a reasonable average return upon capital actually expended." The Commission states that it regards as a serious omission the failure of the company to produce the records although requested to do so, and that in the absence of such records "the Commission does not feel warranted in accepting estimates which appear to be unduly and unreasonably large, and are not supported by the examination and estimates of our own engineers."

' Through an examination of books and accounts the Commission, while not able to determine actual cost, has in most cases been able to fix on a maximum investment. It has been able to say that the actual cost could not have exceeded this maximum amount. Even this has been of great value as it has enabled the Commission to refuse with equity certain purely hypothetical claims for allowance under the reproduction method.

' Although the Commission will give great weight to actual cost when authentic figures of actual cost are available, it fully recognizes that "the mere fact of investment does not estab-

lish a perpetual value, not only because a mistake in judgment may be made, but also because property may be allowed to deteriorate, because progress in the arts may make it obsolete, and because a change in economic conditions may decrease the use made of it by the public. . . . To assert that because a company at one time put money into property which has become useless, worn-out and obsolete, a successor company which purchases that property at foreclosure sale should be allowed to capitalize for the amount originally expended is so absurd as not to require further discussion. Investment may be evidence of the good intentions of the investor, but it is not an infallible standard of perpetual value." (2 P.S.C., 1st Dist., N.Y., 347, 390-91).

Reproduction
cost.

'As the investment records proved inadequate the Commission has in each case been compelled to rely largely on an estimate of reproduction cost. This estimate has been made with great care by the Commission's engineers. In certain cases the inventory has been prepared by the Commission's engineers with the co-operation of the engineer for the company, and the appraisal has then been checked by the engineer for the company. In other cases the company's witnesses have made independent appraisals. The unit prices have been fixed after an examination of the company's records and a comparison with prices of well-known manufacturers and contractors for a period of about five years. The unit prices "cover profits of sub-contractors and allowances for engineering, supervision, etc., ordinarily included by sub-contractors in their charges." (4 P.S.C., 1st Dist., N.Y., 328, 337.) The unit prices are based to a considerable extent on piecemeal construction (4 P.S.C., 1st Dist., N.Y., 328, 337). In the Third Avenue Reorganization Case the Commission notes that the unit prices used by its engineer ranged from 7 to 42 per cent in excess of certain contract prices actually paid by the company. The Commission adds that this shows that the company has been generously treated either from the standpoint of original cost or reproduction cost and that "this should not be forgotten, for it has been considered in reaching final conclusion."

Contractors' profit, engineering and administration contingencies and incidentals.

'The net cost of labour and materials having been determined by the Commission, an allowance is added to cover general contractor's profit, engineering, supervision, contingencies and incidentals where these allowances seem justifiable. It has been a general practice for the Commission to allow 10 per cent for general contractor's profit and from 10 per cent to 15 per cent for engineering, supervision, contingencies and incidentals upon the items to which these charges would properly apply. Even where a general contractor is assumed, his profit is not allowed upon land, rolling stock, tools, supplies, fixtures, etc., as such items are not purchased through a general contractor. In the Metropolitan Street Railway Reorganization Case (3 P.S.C., 1st Dist., N.Y., 113, 142), Commissioner Maltbie discusses this subject as follows:—

‘Mr. Connette also maintained, and it is believed properly so, that a 10 per cent profit upon the cost of rolling stock is unjustified. Cars are ordinarily bought directly from the manufacturers, who bear all expenses connected with the designing, construction and testing of the cars, and the prices charged are sufficient to cover all such costs. The unit prices adopted by Mr. Connette and Mr. Uebelacker, the witness for the applicants, include delivery in New York City, the cost of assembling and other incidental expenses. The applicants have presented no evidence to show that a general contractor’s profit of 10 per cent above such unit prices has ever been paid, and it would be considered wasteful and extravagant to pay a general contractor a profit of nearly \$1,000,000—10 per cent of the net cost—for doing practically nothing. Indeed, companies ordinarily buy direct from the manufacturers, and this practice is considered economical and prudent. The same may be said regarding the other items upon which Mr. Connette does not allow a general contractor’s profit. A company needs no middleman to negotiate for the purchase and delivery of tools, supplies, fixtures, etc.’

‘Under the terms “preliminary and development expense” the Commission includes allowance to cover promotion ex-
Preliminary and development expenses.
 pense; organization of the company; franchise and consent expenses; interest and taxes during construction; trial operation; adjustment of parts, etc. These are mostly items such as are ordinarily classified as overhead charges. Certain of the items such as trial operation and adjustment of parts are sometimes considered in estimating going value. For many of the items included under the general head of “preliminary and development expense” there is little data upon which an estimate of cost may be based. The Commission gives great weight to any evidence showing actual expenditures incurred by the company for these purposes. It is inclined to give slight consideration to estimates of reproduction cost for these items based on hypothetical conditions. The allowance made by the Commission is not given as a percentage of net cost, but is a lump sum which under the conditions applicable to the particular company seems to the Commission adequate to cover all of these expenses. This allowance as a percentage upon the reproduction cost of physical property, including land, would naturally vary considerably for different companies. Many expenses are nearly the same in amount regardless of the size of the company. In the Kings County Lighting Case the allowance for preliminary and development expense amounted to 10 per cent upon the reproduction cost.

‘From the cost-of-reproduction-new the Commission deducts the accrued depreciation. The estimate of accrued depreciation is based chiefly on life tables and the application of the straight line method. The estimate covers depreciation due to wear and tear and age and to some extent to changes
Accrued depreciation.

in the art and the abandonment or supersession of property because of inadequacy. In the Queens Borough Case, 2 P.S.C., 1st Dist., N.Y., 544, 562, the Commission says:—

‘The basis upon which depreciation has been computed, such as life tables, expired life, etc., have been accepted as fair by the company.

‘It should be stated that the above estimate covers depreciation due to wear and tear and age, but does not include allowance for future changes in the art and abandonment or supersession of property because it will become inadequate before being worn out. What these will be, not one can predict with certainty, but they will appear. The data used to determine existing depreciation have been used to fix the amount that should annually be set aside, out of earnings, to meet accruing depreciation. If the above estimate is too low, then the annual payment is too low. But if the above estimate is too low, then the present value is too high and the amount to be accepted as a fair return on “fair value” should be reduced. As it is probable that these refinements would not in this case appreciably affect the final result, they may be disregarded. They are important to the company, however, in determining the disposition to be made of net earnings.’

Land.

‘In its valuations the Commission has taken the position following what it believes to have been the decisions of the courts, “that land should be taken at its present fair value, provided the plant is wisely located and well planned.” (2 P.S.C., 1st Dist., N.Y., 659, 684.) The Commission points out, however, that inasmuch as the buildings upon the land are appraised upon a use-value basis, instead of a scrap-value basis, there would be duplication and inconsistency in appraising the land at the highest price it might bring, assuming the land to be unoccupied. Commissioner Maltbie in the Kings County Lighting Case says (at page 684):—

‘The value to be taken is the present fair value. It would be unfair to take boom figures, and it would be equally unfair to fix the price at what the property would bring at forced sale. Furthermore, consideration must be given to the fact that the property is covered with certain structures. We must not assume that the buildings are not there and then take the highest estimate a real estate broker thinks might be obtained for the land itself, for if the land is appraised on this basis and the buildings on a use-value basis, instead of a scrap-value basis, there would be duplication and inconsistency? It would also be unfair to assume that the buildings are to be scrapped and the land sold for a less advantageous use than might be made of it.’

Appreciation in
land value.

‘Although the Commission takes land at its present or appreciated value it has adopted a method of treating appreciation as income, and thus neutralizing to a certain extent the effect of appreciating land values in the determination of a

reasonable rate of charge. If the problem is to determine the fair cost of production, it is clear that income or profit from every source must be considered. The Commission holds that "the profit obtained from increasing land values from which one receives an income is just as real as any profit. The person who rents property that cost him \$10,000 several years ago at a rental which yields him a return upon \$50,000 has just as certainly realized a profit from the increased value of the land as if he had sold it and invested the \$50,000 elsewhere. The Commission throughout, from 1909 to 1913, allowed 7½ per cent return upon the increasing value of the land, and it must, in order to be consistent, consider the annual increase as a profit for the purposes of this case." (2 P.S.C., 1st Dist., N.Y.; 714, 729.) In the Queens Borough Gas Case (2 P.S.C., 1st Dist., N.Y., 544, 586-587), Commissioner Maltbie discusses this subject as follows:—"Thus, land has been taken at its fair value and not at its original cost, and the annual appreciation of land has been treated as a profit. By this method, all property is treated absolutely alike, as Judge Hough suggests. No difference is made, except that as depreciation represents a decrease in assets, it is placed as a debit against operation, which appreciation is placed as credit because it is an increase in assets. Land has sometimes been treated like other property only to a degree; that is, each class has been appraised at its present worth or value. That has been done in this case. But if property is to be taken at its depreciated value where it has depreciated, an entry must regularly be made in estimated operating expenses equal to the average annual depreciation. Conversely, if land, or any other property which genuinely appreciates in value, is to be taken at its appreciated value, then an entry must be made in the estimated receipts equal to the average annual appreciation. Unless this is done, it is obvious that the consumer will be burdened with all the estimated decreases in assets but not credited with the increases in assets. If the principle laid down by the courts is to be followed in part, it should be followed in whole.

‘It is suggested that the annual increase in the value of land which is treated as income is not actually received. Increase in the value of unoccupied land is not realized until sold or put into use, but it is real, nevertheless, although payment may be deferred. Likewise, payments to the depreciation fund are not actually expended; yet they have been considered legitimate charges in practically every case. Furthermore, the annual increment is no more indefinite than the total increment—the present value. But if the present value can be determined, it is possible to determine past annual appreciation, with positive accuracy for it is only a simple mathematical calculation. It is also probably as easy to estimate increases in the near

future as it is to estimate what obsolescence, which is a form of depreciation, there will be in the future.

‘Some persons in considering the matter very frankly admit that appreciation in land value does constitute a very important part of the real income of certain public service companies. But they argue that inasmuch as this source of additional income was probably counted on by those who originally invested money in the enterprise it is not fair to deny them the advantage of such appreciation in a rate case. In this they overlook the true nature of a “fair average return.” A “fair average return” is assumed to be not a part payment but a payment in full. It should necessarily take into consideration all the conditions and be full compensation for the service rendered. If, however, the view is taken that income from land appreciation should be treated as a separate and additional item and should not be included in the fair return, then the fair return must necessarily be reduced by the amount of such appreciation. The result is, of course, the same. If appreciation is disregarded in the income account, it must nevertheless be considered in fixing the rate of return. There is no escape from the logic of the position that in determining a fair average return profits from every source must in some way be considered. If they are not included in the income account, they must necessarily be considered in fixing the fair rate of return. There can be neither logic nor equity in the position that a total fair average return can be determined without a due allowance for profits from appreciation in land value.

Property
donated.

‘In the Brooklyn Union Elevated Rate Case, 2 P.S.C., 1st Dist., N.Y., 246, 265, the question of including in the value of a railway property constructed out of the city’s contribution to the expense of grade separation was discussed. The city had contributed approximately \$800,000 toward the expense of depressing the tracks of the company. Commissioner Maltbie discussed this subject as follows:—

‘In the fourth place, contributions by the city should be deducted. The City of New York has paid to the Brooklyn Union Elevated Railroad Company approximately \$800,000. No company ought to be allowed to capitalize such contributions or charge a rate which will yield a fair return upon these contributions. With equal propriety the companies could claim the right to earn profits upon the capitalized value of the streets and of the Brooklyn and Williamsburgh Bridges, which they have been allowed to use practically without charge. The capitalization of franchises, a procedure prohibited by law, would be more plausible.’

Going value.

‘The Commission points out, that certain expenses often included in an estimate of going value have been included by the Commission in its allowances for overhead percentages and

preliminary and development expense. "Value cannot be made by the duplication of titles or the multiplication of names." (2 P.S.C., 1st Dist., N.Y., 620, 638.) Insofar as going value is used to cover provision for pioneer losses or failure to earn profits during a development period of normal length the Commission holds that it should be taken into account in fixing the fair rate of return. In doing so the Commission properly distinguishes between valuation for rate purposes and valuation for purchase purposes. In a rate case the justice of the result does not depend upon the fair value alone or on the rate of return alone, but on the total return or net income allowed which is the product of the fair value and the rate of return. In a rate case, therefore, certain equities may be provided for either in the fair value or in the rate of return. If they had been considered in the rate of return it would be duplication to allow for them again in the fair value and vice versa. These two factors are interdependent and must be considered together. "It is apparent that it (going value) cannot be allowed in both places. If a reasonable amount were to be added to fair value, the rate of return must be lowered; and a small change in the rate of return upon the whole value of the property will more than offset a reasonable allowance for the indefinite elements included under the heading "going value." (2 P.S.C., 1st Dist., N.Y., 714, 719.)

'The position taken by the Commission in regard to going value is concisely summarized in Commissioner Maltbie's opinion in the Kings County Lighting Case (2 P.S.C., 1st Dist., N.Y., 659, 694-695), as follows:—

'A few pertinent facts that relate to the present case should be noted:

'1. Throughout the appraisal the plant has been treated as a "going concern." The property has not been valued as a defunct or static concern. If it had been, the value would be very much lower than the amount fixed. In considering depreciation, for example, the fact that the plant is being, has been and probably will continue to be operated has been recognized as an important factor.

'2. The appraisal contains generous allowances for contractors' profits, engineering, supervision, administration, contingencies and incidentals, amounting to about \$340,000.

'3. Preliminary and development expenses, including promotion and organization of the original company, legal and technical advice, franchise requirements, experimental and trial operation of machinery, organization of staff, etc., have already been included at \$260,000. These items are certainly connected with the creation of a "going concern" and with the development of the business.

'4. The estimates of the witnesses for the company as to "going value" were not based upon actual expenditures of the

company, but upon assumptions and hypothetical considerations.

'5. No records of actual expenditures made by the present company or its predecessors have been produced although requested. If the establishment of a going concern necessitates investment beyond the items already passed, the fact and extent of such investment should be shown.

'6. The present case is a rate case, the fundamental question being to determine what the reasonable income to be collected from gas consumers should be. Consequently, computations to determine fair value or fair return based upon present income are unsound and illogical.

'7. Good-will is not a proper element to be appraised and included in fair value. (*Willcox vs. Consolidated Gas Co.*, 212 U.S., 52; *Omaha vs. Omaha Water Co.*, 218, U.S., 202.) What may not be valued under the name of good-will or franchise value may not be infused into fair value under another name.

'In the opinion of the Commission, whatever allowance should be made for the various factors covered by the somewhat vague and indefinite term "going concern" beyond what has already been conceded should be made in determining the fair rate of return.'

Working capital.

A discriminating discussion of working capital as applied to a gas company is contained in Commissioner Maltbie's opinion in the Kings County Case, 2 P.S.C., 1st Dist., N.Y., 659-688-690:—

'A gas company must purchase materials and supplies, must pay its employees and must distribute its commodity to consumers in advance of payment for such service. This requires a fund ordinarily called working capital. It is reimbursed from operating receipts from time to time, but originally it is provided from capital. The amount needed depends upon the advances that must be made and the period for which they must be carried. Ordinarily, the bulk of materials and supplies are not paid for immediately upon delivery; 60 or 90 days are commonly allowed. Labour must be paid weekly or monthly.

'Upon the other hand, bills are rendered to large consumers weekly and to small consumers monthly. Many consumers do not pay promptly, and the city is usually in arrears. In addition, allowance should be made for unforeseen demands and the storage of supplies to prevent delays in transportation, particularly in winter.

Annual
depreciation
allowance.

'In estimating the annual depreciation allowance in a rate case the Commission has not followed literally either the straight line method or the sinking fund method. In the first place, it has attempted to ascertain the extent to which minor replacements are included in the repair account and treated as current operating expense. It has then estimated the amount which in addition will be required to take care of all replace-

ments due either to wear and tear and age or to obsolescence and inadequacy. In the case of long-lived units it has taken into consideration the interest accumulations from the annual depreciation allowances. To this extent it has applied the sinking fund method. The problem is discussed at length in the opinion by Commissioner Maltbie in the Queens Borough Case (2 P.S.C., 1st Dist., N. Y., 544, 583-585):—

‘Experience has shown that the straight line method for depreciation produces a larger fund than is necessary. Firstly, some portion of the annual loss is made good by renewals and replacements regularly included in maintenance and already allowed for in the operating expenses. There are difficulties, however, in ascertaining the precise amount of depreciation thus made good by maintenance. The system of accounts prescribed by the Commission defines repairs as follows:

‘When through wear and tear or through casualty it becomes necessary to replace some part of any structure, facility or unit of equipment, and the *extent of such replacement does not amount to a substantial change of identity* in such structure, facility or unit of equipment, the replacement of such part is to be considered a *repair* and the cost of such repair is to be treated as an operating expense and must not be charged as a replacement in any capital account.’ (Section 15.)

‘It is further provided that “where capital is substantially continuous and cannot be satisfactorily individualized it shall be kept in efficient operating condition through repair and the renewals and replacements of parts thereof shall be considered repairs.” In addition to this general rule, the system of accounts for electric companies distinctly provides that renewals of the electric line (poles, fixtures, cables and wires of the transmission and distribution systems) shall be included in maintenance, as it would be unduly troublesome to ask companies to keep a separate record of each pole or stretch of trolley wire. From the detailed figures of annual deterioration submitted by the appraisers, it appears that \$8,500, or fully one-fourth of the total straight-line depreciation of the electric plant, proceeds from the poles and fixtures and transmission and distribution system. In the case of various other classes of equipment like boilers, piping and other accessories, partial replacements are made and charged to maintenance which in the course of time will completely replace the exhausted capital. So extensive, indeed, are the partial replacements and renewals usually included in current maintenance that many of the largest corporations under the supervision of the Commission have taken the position that no special depreciation fund is required in their cases.

‘It may be noted that in the year 1910 the amount expended by the Queens Borough Company for renewals and replacements not included in maintenance was only \$1,306, all of which was on the gas plant. While provision must be made for the future replacement of large units such as gas holders, power plant equipment, etc., it would appear that the

annual expenditures for replacements for the present are likely to be comparatively small, and that any fund set aside for future replacements could be invested and interest thereon compounded. The annual contribution to a 4 per cent sinking fund to take care of all replacements, according to the above table, would be only \$40,000 for both departments and the annual contribution to a 5 per cent sinking fund (5 per cent being the rate of interest which the company pays on its own bonds) would be less than \$37,000. If the company were to invest the fund in its own property and if a fair return were to be computed at 7 or 8 per cent, the amount to be set aside annually would be considerably less.

‘However, experience seems to prove that in actual practice a sinking fund will not accumulate as rapidly as the tables indicate. There are usually withdrawals in early years which decrease the rate at which the amount compounds. There are also occurrences which cannot be foreseen but against which some provision should be made. Allowance having been made for all of these factors the amounts used in the preceding computations are considered unusually fair to the company and should provide against depreciation of all kinds, including obsolescence, inadequacy and other contingencies. It is probable that in the future those amounts should be reduced.

‘The question whether depreciation is a proper operating charge, is no longer open to debate. The opinion of Mr. Justice Moody, already cited, reflects the generally recognized rule that rates should be sufficient to permit current repairs to be made, parts to be replaced, and other charges met, so that by one means or another the investment may be kept unimpaired. In order that this object may be attained, every part of the property must be considered, and wherever there is decrease in value, provision must be made for an offset in one form or another. If a gas company includes a coal mine among its assets and makes no provision against the day when it will be useless, the capital of the company will be impaired just as truly as in the case of a gas-holder which has worn out without any provision for its replacement.’

Rate of return.

‘The Commission holds that fair value and rate of return are interdependent factors. “The rate of return is as important as the value of the property, and in the process of arriving at a reasonable percentage, the Commission has considered the amount determined as the fair value and the principles followed in such determination.” (2 P.S.C., 1st Dist., N.Y., 659, 696.) “It is obvious that a high figure might be taken as the fair value of the property and the rate of return placed so low that the investor would not receive adequate remuneration. It is also obvious that the rate of return might be fixed so high that the investor would be adequately compensated even though the amount taken as the fair value of the property were too low. It is immaterial to the permanent investor whether he is allowed 7½ per cent upon a valuation of \$1,000,000, or 6 per cent upon a valuation of \$1,250,000.” (2 P.S.C., 1st Dist., N.Y., 544, 576.)

'The Commission holds that the rate of return should be adequate to induce investors to construct utility plants within the particular areas in question. In the Queens Borough Case (2 P.S.C., 1st Dist., N.Y., 544), Commissioner Maltbie says (at pages 576-578, 580):—

'Various standards have been suggested for determining the fair rate of return. The one which in our opinion is properly applicable to this case is that the rate should be such that investors would be induced to provide the funds with which to construct and extend a gas and an electric plant within the area in question. If the state were to fix a rate below this standard, capital could not be secured. If investment were made before the state acted, the original capital might be forced to remain, but additional capital could not be secured unless necessary to protect the first outlay.

'The ordinary method of raising funds must also be considered, for money can be secured by the issuance of bonds at a lower rate than stockholders demand. Other things being equal, the rate of interest which must be paid increases as the proportion of the capital raised by the issuance of bonds increases. Under ordinary circumstances, a public service corporation would be conservatively financed if one-half or two-thirds of the funds needed were secured by first mortgage bonds and the remainder by the issuance of capital stock. In a case such as the one now being considered probably one-half of the cost of the plant could be raised by the issuance of first mortgage bonds upon a basis of from 5 to 6 per cent. As a matter of fact, the par value of the bonds of the present company is equal to the stock. It is also probable that a return of from 8 to 10 per cent upon the stock would attract sufficient capital to provide the remainder.'

37. At the risk of apparently overloading this Memorandum upon the subject of valuation, I desire to add further documents relating to the consideration of the subject of valuation of public utilities by the Congress of the United States. The control of capitalization and bond issues is inextricably bound up with this subject of valuation and the difficulties presented unfold as the subject is considered. At the last session of the Congress of the United States, 'An Act to Regulate Commerce,' under which the Interstate Commerce Commission is appointed and operates, was amended, to provide for a valuation of the property of common carriers throughout the United States. The deliberations of the Committee of the Senate of the United States to which this Bill was referred are important, more particularly that part which contains the statement of Dr. Commons. Dr. Commons is an economist of repute in the United States, and his attainments are fully set out in his statement at page 355. The report of this Committee, Dr. Commons' statement and the Act as finally passed by Congress are set out in Appendix L, page 345.

Valuation by
Interstate
Commerce
Commission.

Appendix 'L.'

Dr. Commons
statement.

In his statement, Dr. Commons traces the development of the theory of value for taxation, rate making, expropriation proceedings, etc., as indicated by judgments of the Supreme Court of the United States and other Federal Courts, from what is known as the Munn Case, decided in 1876, *Munn v. Illinois*, 94 U.S., 113, in which it was decided upon constitutional grounds, holding that the fixing of rates by legislation of a State was within police power, and not subject to the control of the Constitution of the United States or the Federal courts; the Minnesota Case, *St. Paul & Milwaukee Railway Company v. Minnesota*, 134, U.S. 418, decided in 1889, in which the views of the Court as expressed in the Munn Case were varied, and it was held that it was necessarily within the power of the Courts to declare illegal and unreasonable the rate fixed by a Legislature or a Commission, to *Smyth v. Ames*, decided in 1898, 169 U.S., 466, in which it was clearly decided that a fair return on a fair value of the property used for the convenience of the public was the chief basis of the determination of the reasonableness and the constitutionality of a rate, and *Wilcox v. Consolidated Gas Co.*, 212 U.S., 119, a case which originated before the Commission of the First District of the State of New York, where it was held that the value of a franchise of a public utility company should not be taken into consideration in fixing the rates to be charged by that utility. The decision was varied after being litigated to the Supreme Court of the United States, where it was held in effect that such a franchise value should not be taken into consideration, but that nevertheless where the Legislature had approved of the issue of capitalization based upon such a franchise value, that franchise valuation must be considered. These and several other cases were considered by Dr. Commons, and their effect, methods of valuation and the scope of the valuation were gone into with great care. The methods of valuation to be followed and the difficulties to be encountered are discussed at length.

Hadley's Report.

38. The discussion of the subject of valuation would not be complete without consideration of what is known as the 'Hadley Report.' This report was made by a Commission composed of Arthur Twining Hadley, LL.D., President of Yale University, Director of N. Y. N. H. & H. Railway; Frederick Newton Judson, Washington, of Counsel for the United States in many important cases, Chairman of the State Taxation Commission, Missouri, 1906; Walter L. Fisher, Secretary of the Interior during the administration of Mr. Taft; Frederick Strauss, New York, and Balthasar Henry Meyer, Economist, University of Wisconsin, Chairman of the Railroad Commission of Wisconsin, 1907-1911. The Commission was appointed under the provisions of the Act to create a Commerce Board, approved

18th June, 1910, to investigate questions pertaining to the issuance of stocks and bonds by railway corporations, subject to the provisions of the Act to Regulate Commerce and the power of Congress to regulate or effect the same. This report gives a comprehensive view of the difficulties existing in the United States respecting railway rates, over-capitalization, conflict of jurisdiction and allied subjects. The Report deals with many subjects which do not arise in the Dominion. One of the main recommendations of the Report is the physical valuation of railways for the purpose of fixing rates, and it was in consequence of that recommendation that the Statute of the last session of Congress, Appendix L, page 414, was enacted. The Report is pointed in its view that better and more effective results can be obtained through publicity of the exact financial conditions of railroad corporations, so that the intelligent public may have ample opportunity for protection in the purchase of railroad securities. The disadvantage of approving of issues of securities in advance is pointed out. Physical valuation would give the public more information and protection. Physical valuation with publicity respecting the issue of securities would give greater protection to the public than an approval in advance of the amount and purpose of the issue of shares and securities.

39. A subject of recent and great interest, more fully referred to hereafter, the issue of shares without par value, is also considered. The result of the decision, *Smyth v. Ames*, in the Supreme Court of the United States, that the amount of shares and securities outstanding was but one of the many matters to be considered in deciding whether rates are reasonable, is fully developed and shown to be in accordance with good business principles. The difficulties which would be created by restrictive or drastic legislation in a growing community and the necessity of substantial inducements to pioneers in developing public utilities, are pointed out. Attention is particularly drawn to the fifth paragraph of the recommendations, page 438, as follows:—

Shares without
par value.

5th. If we were compelled to assume that rates are to be materially influenced either in their making by the railroads or in their regulation by the Government by the amount and face value of the stocks and bonds outstanding, it seems to your Commission impossible to escape the conclusion that these securities should be issued only under Governmental regulation. Your Commission, however, believes that the amount and face value of outstanding securities has only an indirect effect upon the actual making of rates and that it should have little if any weight in their regulation.

Control of
Capitalization.

Constitutional
limitations.

40. In considering reports of decisions of Public Utility Commissions and the Courts of the United States, an important constitutional principle must be borne in mind. The latter part of the fourteenth amendment of the Constitution of the United States provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'

In the leading case of *Smyth v. Ames*, 1898, 169 U.S., 466, it was settled that:—

Smyth v. Ames.

'1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. A State enactment or regulation made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment to the Constitution of the United States.

'3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.'

This was not the original doctrine of the Court upon the subject. In *Munn v. Illinois*, 94 U.S., 113, decided in 1884, a rate case, the State legislation authorizing the fixing of the rate was upheld on the ground that the property was affected with a public interest, and the regulation of the rate was solely a legislative power, and the courts were powerless to prevent the abuse of such power by the Legislature.

In *Stanislaus County v. San Joaquin and King's River Canal and Irrigation Company*, 192 U.S., 201, the opinion of the Court was that it was not confiscation, not a taking of property without due process of law, or a denial of equal protection of the laws to fix water rates so as to give an income of six per cent upon the then value of the property actually used for the purpose of supplying water as provided by law even though the company has prior thereto been allowed to fix rates

that would secure to it $1\frac{1}{2}$ per cent a month income upon the capital actually invested in the undertaking. The original cost may have been too great. Mistakes of construction, even though honest, may have been made which materially increased the cost; more property may have been acquired than necessary or needful for the purpose intended.

It should be further understood that a rate fixed by a Public Utility Commission cannot be said to be made by "due process of law." Such Commissions are not "Courts" for the adjudication of the law. They are administrative bodies. The distinction is well brought out by the decision of the Railway and Canal Commission of the United Kingdom in refusing to fix a rate, holding that it was a Court for the purpose of determining the application of the law in cases standing before it, and not an arbitration board.

It should be further borne in mind that throughout the United States the States have constitutional limitations upon their legislatures. It is a usual provision that a State Legislature cannot create a corporation or company by special Act. Special privileges are denied, and all companies must be incorporated under general legislation. The part of the Constitution of the State of Arizona relating to companies is set out in Appendix 'N,' page 439. It is one of the most recent, and is supposed to contain the most modern provisions.

COMMERCIAL, MANUFACTURING AND MERCANTILE COMPANIES.

41. The second branch of this discussion is that which relates to the capitalization of ordinary commercial, manufacturing and mercantile companies.

42. There are three methods of control in practice: first, by a Government Department or official under the condition that a company may not sell shares or commence business until its scheme of operation has been approved; second, by provisions under which a company may not do business until all its capital is subscribed and a definite portion thereof paid up, and third, by a provision which places the commencement of business in the hands of the shareholders themselves after it has been shown that the provisions of the prospectus have been complied with.

43. The effectiveness of these methods is scarcely indicated by the order in which they are set out, but the first method, which appears to have originated in the State of Kansas, and is carried out by the 'Blue Sky' provisions, may require more attention because of the discussion which it has received in the United States.

Kansas Statute.

44. The Kansas Act was passed in the year 1911, and since that time it has been considered by the Legislatures of thirty-four States and passed in twenty-two. It has also been adopted in the Province of Manitoba. For the purpose of making a close investigation of the operation of the Kansas law I went to Topeka some months ago, and studied its operations in the office of the Banking Commission. I also discussed it with the Attorney General and the Secretary of State of Kansas, and with many lawyers and business men of Topeka, Kansas City, Kansas; and Kansas City, Missouri.

History of
enactment.

45. Prior to the election in the State of State of Kansas preceding the last, Mr. J. N. Dolley was the Chairman of the Republican State Committee, and as he was a prominent merchant and president of a local savings bank, on the return of his party to office he was made Bank Commissioner. One of his first moves in office was to devise a means of checking what had become a public nuisance and scandal in the State of Kansas. The State is largely agricultural, with very few cities, and none of them large. The rural population had always been an easy prey to the vendor of bogus or questionable securities. Mr. Dolley established a branch of his office for the purpose of investigating securities offered generally throughout the State, and for the purpose of showing the advantage of the Department, gave the matter as great publicity as possible through the press, as shown by the following:—

STATE OF KANSAS,
OFFICE OF BANK COMMISSIONER,

J. N. DOLLEY,
Bank Commissioner.

TOPEKA, April 9, 1910.

To the Editor:—

As you perhaps know, I have established a department in the Bank Commissioner's office to protect the people of Kansas from fakers with worthless stock to sell. I give you below a small item concerning the matter, which I hope you may be able to use in your paper. I have no funds for advertising purposes, and the only way I can get this information before the people is through the generosity of the Kansas press. Thanking you for whatever you may do in the premises, I am,

Sincerely yours,

J. N. DOLLEY,
Bank Commissioner.

TOPEKA, April, 9.

To the People of Kansas:

The State Banking Department has established a bureau for the purpose of giving information as to the financial standing

of companies whose stock is offered for sale to the people of Kansas. If you are offered any stock, and want information as to the financial standing of the company offering the same before investing, please write this department, and I will furnish it.

J. N. DOLLEY,
State Bank Commissioner.

46. This campaign appears to have been fairly successful, and some time later Mr. Dolley communicated the following letter to the editors of the various newspapers in the State:—

STATE OF KANSAS,
OFFICE OF BANK COMMISSIONER,

J. N. DOLLEY,
Bank Commissioner.

TOPEKA, December 16, 1910.

To the Editor:—

About one year ago the banking department organized a bureau to investigate the sale of stocks, bonds and other securities in Kansas. We have made much research along these lines, and are amazed at the enormous amount of money the Kansas people are being swindled out of by these fakers and “blue-sky merchants.” I find that Kansas is literally infested with them.

They are sitting around, and when a man dies the widow receives her pittance of insurance—one, two or three thousand dollars, as the case may be, mostly from fraternal insurance. These thieves show up a few days after the funeral and undertake to sell the widow some of their fake stock promising her dividends of anywhere from fifteen to fifty per cent. per annum. They are getting a large amount of money from this source, as well as a great many other sources, and their victims are mostly those who are unacquainted with business methods, but are hard-working, frugal, saving people, and can ill afford to lose the money.

I find that Kansas has been tolled millions and millions of dollars during the past few years by these confidence men, and ninety-eight per cent of the money so paid has been entirely lost by the investor. As near as I can ascertain, they are tolling Kansas at the rate of somewhere between one and three million dollars per annum. Scores of them have quickly packed their grips and left the State upon this department starting to look them up. I do not believe that there are one-third as many operating in Kansas to-day as there were one year ago, and I propose, through the newspapers, with publicity to drive every one of these thieves possible from our State. I will ask the Legislature for a law clothing some department of State, with the power to remove these financial cancers entirely from our State, and I am sure, with the proper help from the Legislature, we can do so.

I sent the papers an announcement several months ago, which they kindly published, warning their subscribers, and I

now wish to thank them for their kind assistance at that time. I enclose you a blank that I would like to have you print in your valuable paper, so that any one of your subscribers, if they wish information along these lines, may clip the same from your paper, fill it out and mail to this department, and I am sure we can give them some valuable advice and be of much assistance to them in investing their money where it will not be lost.

I regret very much that I have no funds to pay you for this work and am obliged to ask you to do it gratis, but I know that you are interested in stopping this dishonest flow of money from Kansas and keep it within the State, to develop our vast resources, and at the same time protect your subscribers and the class of people who are being robbed, many of whom are helpless against the intrigues and dishonesty of these get-rich-quick vultures.

Thanking you in advance for any favors and help that you may kindly render along this line, I am,

Sincerely yours,

J. N. DOLLEY,

Bank Commissioner.

NOTE.—If you desire you may print this letter, or any part of it, with the blank. Neither blank nor letter to be published before December 21, 1910.

(FORM 35.)

....., KANSAS,
..... 191-.

J. N. Dolley, Bank Commissioner, Topeka, Kansas:

DEAR SIR,—I have been solicited to invest in the.....

.....
(Name of concern or corporation.)

.....
(Street number or building.)

.....
(Town and State.)

Remarks

.....
Will you kindly give me any information at your command regarding the same?

Very truly yours,

.....

47. Shortly thereafter, at the session of the Legislature for 1911, the 'Blue Sky Law' was passed. Under its provisions, no domestic or foreign company could sell its shares in the State without receiving a certificate from the Banking Commission. Agents and vendors of securities were also required to procure a certificate to enable them to carry on their business. The whole scheme of the company's business was required to be submitted to the Banking Commissioner, and his conclusion was unappealable. The difficulties which might arise through an arbitrary exercise of the position of the Bank Commissioner, were alluded to in a suggestion of Mr. Dolley himself that authority be placed in the hands of the charter board composed of the Secretary of State, the Attorney General and the Banking Commissioner of the State. The Act was amended in this respect by the Statute of 1913. The Statute as amended, together with the forms and regulations thereunder, are shown in Appendix 'O,' page 443.

Provisions of
Blue Sky law.

Appendix O.

48. Immediately after the passing of the Statute of 1911, Mr. Dolley commenced a campaign of publicity of its terms and virtues, and I think it is due to him to state that there have been few if any Statutes which have been so thoroughly advertised through the press and magazines of the United States.

Publicity given
Blue Sky law.

49. Mr. Dolley in his first report of the operation of the Act, published 1st September, 1912, states as follows:—

Banking
Commissioners
Report on
Blue Sky law.

'The Department succeeded in getting the last Legislature to pass House Bill 906, commonly known as the Kansas "Blue Sky" law, providing for the regulation and supervision of the sale of stocks, bonds, and other securities. This law, as you know, was something entirely new in the business world, but I am pleased to inform you that we have worked the same out in a very nice shape and accomplished some wonderful results. I estimate that it has saved the people of this State at least six million dollars since its enactment. Between fourteen and fifteen hundred companies have been investigated by this Department since the enactment of this law, and of this number less than one hundred have been granted permits to sell their securities in Kansas. The law is rapidly gaining fame all over the civilized world, and I believe that a large number of the States will adopt a similar law at the coming sessions of their Legislatures. I believe that a movement has been started that will eventually result in the regulation and supervision of all kinds of companies in the same manner as banks are now regulated and supervised. There are a few minor amendments that should be made to this law, which I will be pleased to recommend to the Legislature at the proper time.'

50. It will be noticed that Mr. Dolley states that between fourteen and fifteen hundred companies have been investigated

Examination of
report.

by the Department, and that of this number less than one hundred have been granted permits to sell securities. A personal investigation of the files of the Bank Commissioners office casts serious doubt upon the accuracy of this statement. Mr. Dolley, on a change of the political party in power, terminated his official duties on the 1st of April, 1913. The present Bank Commissioner is of a different political party. All the officials of the office have been changed, and it is a matter of great difficulty to obtain reliable information upon the working of the Act. I may say, however, that the figures given to me by the Assistant Commissioner of Banking are as follows: Up to the 1st of April, 1913, permits were granted to forty-nine companies and refused to sixty-two. Permits were granted and subsequently cancelled in three cases, and the applications under the Act numbered about 1,600. It was further explained to me that Mr. Dolley's statement in his report that this large number was investigated means that that number of applications had been received and held for consideration. In the course of my inquiries, I ascertained that the Co-operative Harvester Association, an Illinois company, applied for a permit to dispose of its securities to the extent of \$700,000 in the State of Kansas, and that what was described as a 'temporary permit' given to it. There seems to be no provision in the Statute for such a permit, but I was informed that Mr. Dolley decided that the exigencies of the situation demanded that in order not to stop business such permits should be given. This company proceeded to sell its securities. Some time later, during correspondence between the company and the Bank Commissioner, a point was reached at which the company refused to give additional information which the Bank Commissioner required, and the company decided to retire from the State. In the meantime, I am told that it had sold the greater portion of the securities for which they required a permit. The company is now in liquidation, and it is likely that all the capital invested will be lost. I was also informed of other cases where temporary permits have been given and gross fraud has been perpetrated.

Effective
provision of
Blue Sky law.

51. I discussed the results of my investigation in conversation with Dr. H. A. Millis, Professor of Economics at the University of Kansas, at Lawrence, Kan., who had on several occasions checked the files of the office of the Banking Commissioner. He confirmed my results, with this exception, that the number of companies to which permits were given and permits refused are scarcely accurate, but the difference is so small as to be negligible in discussing the subject. It is apparent

that the provision for investigation and permit was in effect inoperative, and it was a matter of surprise to find that with scarcely an exception the highest praise was given to this Statute by everyone with whom I discussed the subject, both at Kansas City, Mo., and Kansas City, Kan., and Topeka, Kan., the universal belief being that the number of fraudulent securities offered has been very largely decreased, and the character of the persons offering securities has been raised. In my investigation I came to the conclusion that the clause of the Statute which required vendors of securities to obtain a certificate from the Banking Commissioner is entitled to all the credit for that result. The Statute was so widely advertised, and the statement that it was being stringently enforced became so widely circulated that vendors of questionable securities were frightened away. If there is any virtue whatever in the Statute, it appears to me to be owing to this particular provision. I may say that I discussed this deduction with several prominent lawyers in Kansas City, and they agreed with my conclusion.

52. It is impossible to obtain from the office of the Banking Commissioner at Topeka any definite information respecting the policy laid down for the administration of the Act. On account of the complete change in the personnel of the Department following a change in the political party in control of the State, there is a complete break in the continuity of the administration of the Act. Some light, however, is thrown upon the methods adopted through the forms which follow the Statute, and which appear in Appendix 'O,' at page 449, Appendix Q. These are appropriate for applications for licenses from the Commissioner on the incorporation of a new company, upon the sale of securities of an existing company and upon an application to dispose of lands situate outside of the State of Kansas. Methods under Blue Sky law.

53. Notwithstanding the public clamour for the enactment of blue sky laws similar to those of the State of Kansas, what appears to me to be the beneficial feature of that Statute has appealed to the Legislatures of several of the States. The State of Louisiana, at the session of 1912, enacted a Statute for the purpose of licensing vendors of securities, and this is the extent to which that State has gone in this line of legislation. The Louisiana Statute is set out in Appendix 'P,' page 462. Appendix P. If a similar policy were followed in Canada it is probable that such legislation should be adopted by the Provinces rather than by the Dominion. Section 92 of the British North America Act, clause 9, provides that the Provinces shall have exclusive Legislation of other States.

jurisdiction over 'shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes.' While there has not been a complete analysis of this clause, and the Privy Council has expressed its doubt that the licenses referred to may be brought within one class, nevertheless there is ground for the contention that the licenses referred to are those of occupations, and if this is the correct construction of the clause, the issue of licenses for the sale of securities would be within Provincial jurisdiction. The Legislature of the Province of Ontario has provided for a similar license in the case of insurance agents. The Insurance Act (2 Geo. V., Cap. 31, Ont.), Section 100, which provides that under certain circumstances an insurance broker or agent when duly licensed under this section may place insurance contracts with foreign insurance companies.

Wisconsin
Blue Sky law.

54. One of the most recent enactments of blue sky laws is that of the State of Wisconsin. It was enacted within the last few months, and no doubt after due consideration of all the objections which have been raised to the blue sky law of Kansas. The most prominent feature of the Act is the provision for the licensing of brokers and agents. Nevertheless, it provides very similarly to the Kansas Statute for the inspection and issue of permits to companies where the expense of organization is larger than the sum of \$2,500. The Wisconsin Statute is set out in Appendix 'Q,' page 463. The ease with which the latter provision may be evaded will no doubt make this Statute a dead letter.

Appendix Q.

Legislation
against
Blue Sky law.

55. There is what might be fairly called a general attack upon blue sky legislation throughout the United States, on the ground of unconstitutionality. Similar grounds are not open for discussion in Canada. They are based upon the 14th amendment of the Constitution of the United States, upon the ground that such legislation infringes upon the liberty of the individual in disposing freely of his property, and also upon the ground that there is a delegation of authority from the Legislature to the Banking, Corporation or other Commissioner administering the Act, as there is a discretion in such a body which is not controlled by definite provisions of the Statute. Proceedings are now being taken in the States of Kansas, Iowa, Ohio, and Michigan, enjoining the Commissioners acting under the respective Acts from exercising their powers.

Indiana
Blue Sky law.

56. The Kansas blue sky law was introduced before the Legislature of the State of Indiana and passed both houses. It was then vetoed by the Governor. The consideration of

the whole subject is before a Commission appointed by the Governor of Indiana, and no doubt legislation will follow the report of the Commission. This has not yet been done. However, the message of the Governor of Indiana to the Legislature in giving his reasons for the veto to the Bill are worthy of consideration, and are set out as follows, reprinted from the Bulletin of the Investment Bankers Association.

MESSAGE OF GOVERNOR RALSTON IN VETOING THE BLUE SKY
LAW OF INDIANA.

March 15th, 1913.

Mr. President and Gentlemen of the Senate of the Sixty-eighth General Assembly:—

‘I return you herewith Senate Bill No. 10, commonly known as the Blue Sky Bill, without executive approval.

‘I have given considerable thought to this bill, with the hope that I might see my way clear to approve it, but I am unable to reach that conclusion.

‘In my inaugural address, I recommended “Blue Sky Legislation,” and was very desirous that a law should be enacted that would protect innocent investors in the stocks, bonds and other evidences of corporate indebtedness, but I feel that the law proposed by you, as set forth in this bill would prove oppressive to legitimate business interests, and would conflict in more than one respect with the organic laws of the state and nation.

‘It is my intention, in view of my inability to approve the Bill under consideration, to appoint a high grade commission of three public-spirited citizens, who will give their time and service, without charge, to the preparation of a bill on this subject, to be submitted to the next regular session of the General Assembly.

‘Before reaching the conclusion, that I could not approve Senate Bill No. 10, I asked the Attorney-General to give me his written opinion as to whether or not said bill should become a law. Hon. James E. McCullough, Deputy Attorney-General, was present at a public hearing I gave on this bill, and heard the arguments advanced for and against it.

I herewith submit to you the opinion of Attorney-General Honan, in full, as follows, to wit.:

‘March 14th, 1913.

‘DEAR SIR,—I have yours of to-day, touching Senate Bill No. 10, commonly known as the “Blue Sky Bill,” and requesting an opinion as to whether the same can and should become a law.

‘To which I beg to respond as follows: I am very decisively of the impression that the bill if enacted into the form of a law would be entirely void. Some of my reasons for being of that opinion I will state.

‘There is much indefiniteness and confusion among the various provisions of the bill. It would offer wide latitude for

construction in arriving at what really is intended thereby. The rule is elementary, of course, that where a bill is susceptible of two constructions, one of which would render it constitutional and the other of which would render it unconstitutional, it should receive the first construction. I am of the opinion, however, that no possible construction could be given to this bill that would render it constitutional. For instance, the title of the bill purports to be "An Act concerning the sale of stocks, bonds and other evidences of indebtedness." By section 2 of the Bill it would appear plainly to apply to the sale or negotiation "of any stocks, bonds or other securities of any kind or character," except the bonds of the United States, the State of Indiana, or of some municipality of the State of Indiana." Looking to section 3 alone, it would possibly appear that the bill is only intended to apply to stocks or obligations of corporations, for it requires to be filed a certain statement of the incorporation, conditions, &c., "of the corporation, whose stock or obligations it is proposed that the licensee shall sell, offer or advertise for sale."

'If by construction the bill should be limited to the stock or other obligations of corporations, it would still be very indefinite as to what corporations are involved, and if that could by any possibility be rendered certain, provisions contained in section 7 would still render the bill unconstitutional and void in any view that might be taken of its provisions.

'This section (section 7) provides, among other things, for the granting of a license or permit, by the examiner, to sell or negotiate the stock or other obligations sought to be sold. It requires the examiner to find, before he issues a license, the concurrence of the following facts: (a) that the company is solvent; (b) that its articles of incorporation or association, its by-laws and constitution, its proposed plan of business and contract contain and provide for a fair, just and equitable plan for the transaction of business; (c) That the same promises, in the judgment of the examiner, a fair return on the stock, bonds, and other securities by it so offered for sale. Finding the concurrence of the above facts, the bill authorizes the examiner to issue a permit or license. Not finding the concurrence of the above facts, the Bill does not in terms say what the examiner shall do in the premises. It does provide, however, that if the examiner finds (a) That such articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract, contain any provision that is unfair, unjust, inequitable or oppressive, to any class of purchasers or contributors; (b) or if he decides "from his examination of its affairs," that the company is not solvent and does not intend to do a fair and honest business, and in his judgment does not promise a fair return of the stocks, bonds or other securities by it offered for sale, then he shall refuse a license or permit to sell. It will thus be seen that the Bill leaves a wide zone between the case of granting a license and the case of refusing a license, in which there is not direction as to what

the examiner shall do. In other words, it fixes a test on which he shall grant a license. It departs from that test when it directs him to withhold a license, thus creating confusion and uncertainty.

‘But even if the test were certain, the Bill I think would be clearly unconstitutional. The legislature not only cannot confer power upon the examiner as is here attempted, but under no circumstances would the legislature exercise such power itself. A man may hold stock or the obligation of a corporation for instance that is insolvent, and that does not promise a fair return on the obligations which he holds. It may be worth no more than twenty-five cents on the dollar, nevertheless it is his property and he has a right to sell it three for one, providing he is not perpetrating a fraud in doing so. The legislature could not deprive him of the right to sell it, and to sell it in this State, whether he be a citizen of the State or not.

‘This fact is so familiar to you that citation of authorities would be idle.

‘The Supreme Court of the United States, in Baltimore, etc., *R. R. Company v. Voigt*, 176 U.S., 498, says:—

“Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.”

‘This means, of course, a contract entered into without fraud. It is the every-day applied doctrine, and any legislation that undertakes to prevent it is, of course, void. The Bill here would undertake to make the examiner guardian for all the people of the State of Indiana, or that come into it, and not permit them to trade or sell their property of any kind involved unless in his judgment the purchaser was making a good investment and the corporation solvent, whose stock was offered for sale or bought. The whole Bill is based upon this idea, and beyond legislative power, renders the whole Bill void, I think.

‘It also occurs to me that if this Bill were to become a law, it would in all probability have a direct opposite effect to that intended by what is known as “Blue Sky Law.” The “Blue Sky Law,” as I understand it, is to prevent fraud; to prevent, among other things, the seller of worthless stock from going out and saying, this is a corporation capitalized for a large amount under the laws of Indiana, or some other State, and having complied with its laws, of course it is all right, and by this means deceiving the innocent purchaser into parting from his money, for a thing of no value or else for a thing of very little value in comparison with what he gives for it.

‘Under this Bill, if a license were granted at all, it would state under the requirements of Section 7 that the examiner in no wise recommends the securities to be offered for sale by the company, but the man who is perpetrating the fraud would

take along a copy of Section 7 to show to his victim that the examiner was of the opinion that the corporation was solvent, that everything was fair connected with it, and that the investor promised a fair return, because otherwise the examiner could not have granted a license. I believe, therefore, that the effect of the Bill, instead of assisting to close the door against fraud, would tend to throw it wide open and aid the fraudulent dealer to secure his victim's money.

'In still other words, it seems to me that the Bill, taken altogether, is a misconception of what is meant by a "Blue Sky Law," and is not on that subject at all.

'I have the honour to be,

'Very respectfully,
(Signed) 'THOS. M. HONAN,
'Attorney General.

'SAMUEL M. RALSTON,
'Governor of Indiana,
'Indianapolis, Indiana.'

'I need add nothing to this opinion. From an unprejudiced examination of the Bill and upon the strength of the Attorney General's criticism thereof, I have not a doubt but that it is my duty to withhold official approval therefrom, and this I do.

'Respectfully submitted,
(Signed) 'SAMUEL M. RALSTON,
'Governor.'

Blue Sky law
in England.

57. Before disposing of this branch of the subject it should be pointed out that the Kansas blue sky method appears to have been fully considered by the Departmental Committee of the Board of Trade of the United Kingdom, which reported in 1895. The report shows no details of the investigation which was made, but summarily disposes of the subject as being an inadequate and improper method of dealing with the subject. See Appendix 'S,' page 473.

Illinois
legislation.

58. The second method of controlling capitalization above referred to is that which prevails in France and Germany and in the State of Illinois in the United States, namely, a provision that all shares of the capital stock of a company must be subscribed and allotted before the company can be organized. The provisions vary with respect to the amount which should be paid up on the shares before organization. These laws were considered by the Departmental Committee of the Imperial Board of Trade which reported in 1895. Copious references thereto are printed in Appendix S, which show the discussions on the subject in the memoranda prepared by M. Edouard Clunet and Mr. Schuster. The sections of the Illinois Statute above referring to the subject are set out in Appendix R, page 467. I endeavoured to ascertain why the law of Illinois

is so framed, whether it was originally intended to prevent over-capitalization, and whether it followed the laws of France and Germany in this respect. Unfortunately, the debates of the State of Illinois are not published. The Journals of both Houses and the Senate show the course of the Bill through the Legislature in the year 1872, and the reports of the Committee thereon, but there is nothing whatever discoverable to show why this legislation is framed as it is. If its particular purpose was the control of capitalization, the Legislature immediately introduced legislation to nullify it by providing that a company may increase its capital without limitations similar to those imposed at the time of incorporation; that is to say, there is no provision that an increase of capital must be fully subscribed and a proportion paid thereon before it can be made effective. The result is that the provision does not control capitalization. In the result, a very large number of companies are created with small capitalization, and after organization their capital is increased. I have discussed this provision with Mr. Edwin H. Cassels, a corporation counsel of Chicago, who informed me that while it was not a general practice it was very frequently resorted to, more particularly by questionable concerns. There is, however, no agitation for a blue sky law in the State of Illinois, and from inquiries I have made I believe that the Statute of that State is not used for the flotation of what in the vernacular are called 'wild cat schemes.'

59. A peculiar feature of the German law should be pointed out. It is referred to in the Memorandum of Herr Schuster, Appendix 'S,' page 486, namely, that the boards which control companies under that law, the first a board of management similar to a board of directors under Canadian law, and the second a board of supervisors. The boards are distinct. No officer, director or paid employee may be a member of the Board of Supervision.

This peculiar feature of German company management is pointed to as one of the main causes for the great success of co-operative banking and farming associations in Germany. The Industrial and Provident Societies Act, 1893, of the United Kingdom, under which co-operative associations are registered, does not expressly provide for a board of supervision, but the Rules set out in the Schedule of the Act are sufficiently wide to permit of such a board. Whether they are usual in such societies I am unable to say. The Bill of 1910 introduced into Parliament (Bill 26, 9-10 Edward VII) to provide for the creating of Co-operative Credit Associations, expressly provided for such a board, as follows:—

BOARD OF SUPERVISION.

Board of supervision.	‘36. Every society shall, at each annual general meeting, elect from its members a board of supervision of at least two members, who shall not be members of the committee, or board of credit, or officers of the society.
Term of office.	‘(2) The members of the board shall hold office for one year and until their successors are appointed.
Duties.	‘(3) The board shall, from time to time, examine and audit the books of the society and deposit books of the members; shall supervise the operations of the committee and board of credit; and shall check the cash investments and securities of the society.
Misappropriation of funds or contravention of rules.	‘(4) In the event of any of the funds, securities or other property of the society being misappropriated or otherwise misdirected from their proper use, or in the event of any of the rules of the society being contravened by the committee or board of credit, or any member thereof, or by any officer, the board shall forthwith call a general meeting of the society.
General meeting called.	‘(5) Pending the holding of such meeting the board may suspend any member of the committee or board of credit, or any officer, and may appoint members of the society to perform the duties of any person so suspended, until the said meeting of the society.
Suspensions by board.	
Report of board, and powers of general meeting.	‘(6) The board shall report to the meeting all circumstances relating to any misappropriation of funds, securities or other property, or any improper diversion thereof, and the causes of suspension of any member of the committee, board of credit or officer, and the society, at the meeting so called or at any adjournment thereof, may dismiss from office or reinstate any member of the committee or board of credit or officer suspended by the board.
Borrowing prohibited.	‘(7) No member of the board shall borrow from or be in any way liable to the society.
Annual report.	‘(8) The board shall submit a written report to each annual general meeting.
No salary to officers.	‘37. No officer shall be paid any sum of money, and shall not be recompensed in any other way, by the society for services rendered to the society.’

THE UNITED KINGDOM.

British legislation.

60. The epidemic of fraudulent promotion of companies during the early years of the last decade of the last century caused a public demand in the United Kingdom for amendments to the Companies Acts. The subject was launched by the appointment of a Departmental Committee by the Board of Trade, which reported in 1895, and was continued by Parliamentary Committees. Their investigations resulted in the Act

of 1900, which enacted stringent provisions respecting prospectuses, directors' liability and floating charges. This statute was soon found to be inadequate and easily evaded. Further amendments were found to be necessary, and a Bill was introduced in the House of Lords in 1906 which resulted in the Act of 1907. In the year 1908, the Companies Acts, 1862-1907, were consolidated. The reports issued on the subject are as follows:—

(a) Report of the Departmental Committee appointed by the Board of Trade to inquire what amendments are necessary in the Companies Acts, 1862-1890, Cd. 7779, 1895. Board of Trade
Report.

(b) House of Lords Committee Report, Companies Bill, 342, 1896.

(c) House of Lords Committee Report, Companies Bill, 384, 1897.

(d) House of Lords Committee Report, Companies Bill, 392, 1898.

(e) Report of the Company Law Amendment Committee, Cd. 3052, 1906.

(f) Report from the Standing Committee of the House of Lords on the Companies Bill, 310, 1907.

(g) Report from the Joint Select Committee of the Lords and Commons on the Companies Consolidation Bill, 252, 1908.

61. During the deliberations of the various Committees advice was asked and given by Chambers of Commerce and other public bodies, barristers, solicitors, bankers and accountants expert in company affairs. The Company Laws of France, Germany and several of the States of the United States were studied. The reports are most instructive and interesting. Some pertinent extracts are set out in Appendix 'S,' page 470. Throughout the reports no express reference is made to over-capitalization or the control of capitalization. The main topics considered, in so far as the subject here dealt with is concerned, were

(a) Means of disclosing the true vendor and the real contracts where a company was incorporated to acquire an existing business and thereby prevent the loading of the purchase money;

(b) Methods of public notice of mortgages and floating charges;

(c) Means of preventing of flotations without adequate capital.

62. Over-capitalization is largely involved in the first topic above referred to. A promoter of a company forms a syndicate to which there is transferred an existing business at a greatly

The prospectus.

enhanced price. This syndicate then becomes the promoter in the eye of the public, and transfers the same business to the new company at a further increase. Franchises, good-will and other intangible assets, including prospective profits, are capitalized. Shares are issued for promotion and underwriting services. Blocks of common shares are issued in this manner for the purpose of bonusing preference shares and debentures. In the result, it is impossible for an investor to ascertain what tangible assets the company acquired, what is the real purchase price thereof, or the persons to whom the excessive profits in shares and cash actually are going. I have indicated only one of the many methods of company promotion. There are as many as there are promoters of fictitious enterprises. In this case, however, which is to some extent typical, the question of over-capitalization is evident. If the investor had means of knowing the persons with whom the company in reality dealt, the contracts entered into, the actual value of intangible and real assets, and the shares and cash paid for promotion and underwriting services, he could judge of the adequacy of the proposed capital and the value of the shares for which he subscribes. The object, therefore, of the prospectus as required by the Act is to provide the investor with this information. Whether the capitalization is too great or too small is for him to judge, and it is the object of the promoter to appeal to the investor in a businesslike way, disclosing in full what he has for sale. The clearly defined purpose of these sections is full publicity. It should be noted here that the Hadley Report (Appendix 'M,' page 422), dwells upon this means of affording security to the investor.

**Publicity of
mortgages.**

63. The second topic above referred to deals with bonds, debentures and mortgages. Similarly, the provisions of the Act do not attempt to control such issues, but to give due publicity thereto. The difficulty in this respect was greater in the United Kingdom than it is in Canada. Except in the Counties of London and York there are no offices for the registry of land mortgages. Bills of sale and chattel mortgages are, however, required to be registered. But beyond land and chattel mortgages there are floating charges which were not required to be registered either in the land registry office or under the Bills of Sale Acts. In Ontario floating charges have been held to be outside the Bills of Sale Act, and not required to be registered. *Johnston v. Wade*, 1908, 17 O.L.R., 372.

Notwithstanding the Canadian Registry Acts and Bills of Sale Act, the practical difficulty of ascertaining the mortgage liabilities is very serious unless all the business of the company is carried on in one county.

64. The third topic above referred to deals with what is perhaps the greatest source of loss in the promotion of companies. Take a typical case. A sanguine and enterprising promoter has a patent device which he considers valuable, and he proposes to establish a company to exploit it. He prepares a businesslike and very sanguine prospectus, showing large prospective business, handsome profits, and large dividends. He has perhaps a circle of friends who join in his enthusiasm, and a substantial portion of his capital is taken up. He concludes from the ease with which he procures this capital that further amounts are readily obtainable, and he launches his enterprise. He buys a piece of land, erects a factory, and the capital subscribed may be sufficient to install some machinery. However, before he can put his business in working shape his capital is depleted and he cannot sell further shares. Then it is necessary for him to obtain a loan to complete his plant. When the plant is complete, he has difficulty in obtaining working capital. Although the enterprise may be sound, well-designed, and sure of success with adequate capital, such a company, so hampered, is bound to fail. It may be fairly said that more money is lost through concerns being launched in this way, without adequate capital, than through deliberate fraud. The method of checking this cause of failure and loss is by fixing a minimum subscription in the prospectus. The promoter appealing to business men must there show a financial statement, including preliminary expenses, cost of plant, machinery, working capital, in complete detail, and he must provide a minimum subscription which will realize sufficient to manage the concern without any doubt as to its being subsequently hampered through want of capital. The fixing of the minimum subscription is a purely business matter. It may be fixed too low, so that it is apparent to the investor that adequate capital to carry on the enterprise will not be produced, or it may be fixed too high, so that there may be difficulty in obtaining sufficient subscriptions to enable business to be commenced. But the safeguard is this, that shares may not be allotted, the business cannot be commenced and the subscriptions must be returned to the subscribers unless the minimum subscription is received within the allotted time. The sections of the Act are set out in Appendix 'T,' page 488. What a prospectus is, and how it should be signed and filed, and referred to in Section 80, page 489. Section 81, page 489, shows what the prospectus must contain. Paragraph (d) provides for a minimum subscription, (e) for a statement of former issues and (f) the names of the vendors of the property to the proposed company, and these provisions are so framed that the true vendor's name must be disclosed. Section

The minimum
subscription.

Appendix 'T.'

2 provides a definition of the word 'vendor,' and it includes anyone who has entered into a contract to sell assets to the company where the purchase money is not paid at the time of the issue of the prospectus, where the purchase money is to be paid out of an issue of shares, or where the contract depends upon its fulfilment for the issue of the shares. These are cloaked by the promotion syndicate. Section 85 restricts the allotment so that it may not be made until the minimum subscription has been made, and until the amount paid has been actually paid to and received by the company.

Section 65, page 488, provides for the statutory meeting. Although the company may commence business after the minimum subscription is made and the certificate to do business is issued under section 87 (2) page 495, nevertheless all the contracts entered into on behalf of the company or by the company are ineffective and merely provisional until they are approved of by the shareholders at the statutory meeting. These provisions, in effect place the launching of the company completely in the hands of the shareholders. The promoters are tied in the first place by the prospectus, in the second place by the minimum subscription, and in the third place by the statutory meeting. If there is any defect in the proceedings, or non-compliance with the statute, the shareholders are entitled to the cancellation of their subscriptions for shares and the return of the moneys paid.

Audit.

66. The subject of audit should not be overlooked. It was fully dealt with by the Report of the Board of Trade Committee and Sections 109-114 were the result. The Companies Act (Canada) makes no provision for an audit, and it is difficult to see how shareholders and creditors can be protected without systematic and periodic audits. No doubt even without such provision in the Act, good business methods demand an audit. But there is no need of protection against good business methods. Provisions for inspection and audit are set out in sections 109-114, pages 503-506.

67. The provisions respecting information as to mortgages, charges, etc., are set out in secs. 93-101, pages 497-502.

Cases.

68. I have not attempted to refer to all the provisions or the effect of them. They speak for themselves. But for the purpose of throwing more light on the sections I set out a memorandum of decisions which will indicate how the Act is dealt with by the Courts.

Hilder v. Dexter (1902), A.C., 474.

To raise working capital a company offered shares at par to the appellant and some other persons with an option to take

further shares at par within a certain time. The appellant subscribed for shares, and, the market price having risen to a premium, desired to take up the further shares:—

Held, reversing the decision of the C. A., that this was not an application of shares or capital money directly or indirectly in payment of commission, discount, or allowance within the meaning of the Companies Act, 1900, sec. 8, sub-sec. 2 (sec. 89, sub-sec. 2, Act 1908, page 496), and (the transaction being otherwise unobjectionable) that the appellant was entitled to exercise the option. *Burrows v. Matabele Gold Reefs and Estates Co., Ltd.* (1901), 2 Ch. 23, in effect overruled.

Finance and Issue, Ltd., v. Canadian Produce Corporation Ltd. (1905), 1 Ch. 37.

The defendant company was registered in 1897, but no public issue of its shares was then made. On May 12, 1904, an agreement was entered into between the plaintiffs and the defendants that the plaintiffs should bear the expense of issuing and advertising a prospectus which had been prepared by the defendants in return for certain payments. The prospectus was duly issued. It stated that the minimum number of shares upon which allotment would be made was 40,000. As soon as the subscriptions amounted to 40,000 the directors proceeded to allot shares to the applicants, including the plaintiffs, and received the application money. It turned out that some of the applications were effected and that the minimum subscription had not been reached. The directors of the defendant company proposed to give to each allottee the option to have the allotments cancelled and the application money returned. The plaintiffs moved for an injunction to restrain them from doing so:—

Held, that the agreement gave the plaintiffs no rights to the injunction; that the allotment was irregular under sec. 4 of the Companies Act, 1900 (sec. 85, Act 1908, page 494), and was voidable; that under that section the allottees had a right at any time to rescind their contract to take shares; that the allottees could also rescind on the double ground that there was an untrue statement in the prospectus, and that the condition with respect of the minimum number of shares had been broken; and that the proposed action of the directors was not *ultra vires*.

Mears v. Western Canada Pulp and Paper Co. (1905), 2 Ch. 353.

In May, 1905, the directors of a new company went to allotment on the minimum subscription fixed by the prospectus, and allotted to the plaintiff the shares for which he had applied. At the date of this allotment the directors had received applications for the full minimum subscription, and cheques for the whole of the application money, but many of these cheques had not been cleared and three of them were not paid on pre-

sentation; though they were at once made good by an underwriting company. On an application by the plaintiff for an interim injunction to restrain the company from dealing with his application money:—

Held (affirming the decision of Swinfen Eady, J. [1905], page 494), it is a condition precedent to a valid allotment that and that the plaintiff was entitled to an interim injunction.

Glasgow Pavilion, Ltd., v. Motherwell (1903), 6 F. 116, distinguished.

Per Swinfen Eady, J., and *semble* per Vaughan Williams and Cozens-Hardy, L. JJ. also; according to the true construction of sec. 4 of the Companies Act, 1900 (sec. 85, Act 1908, page 494), it is a condition precedent to a valid allotment that the whole of the application money should have been paid to and received by the company in cash. Any means by which money can be remitted may be used, but the remittances must be cleared and the actual cash received by the company before allotment.

Brookes v. Hansen (1906), 2 Ch. 129.

Where a company on its formation purchases or proposes to acquire from an absolute owner property which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, sec. 10, sub-sec. 1 (f), of the Companies Act, 1900 (sec. 81, Act 1908, page 489), requires that the name and address of the vendor and the amount of the consideration shall be stated in the prospectus. There is no obligation under the sub-section to disclose the amount of the purchase money, however small, paid by the vendor on his acquisition of the property, however recent.

If the company buys merely the benefit of a contract for the purchase of property, the consideration for which remains wholly or partly undischarged, and so, *pro tanto*, a burden on the property, the company acquiring the benefit of the contract is a 'sub-purchaser' within the meaning of the sub-section,, and the particulars thereby required must be stated in the prospectus.

A company is not a 'sub-purchaser' for the purposes of the sub-section unless it has to pay purchase money to some one other than its own vendor, and it is not necessary to state in the prospectus the amount of any consideration paid or to be paid by anyone other than the company.

In re 'Otto' Electrical Manufacturing Co. (1905), Ltd., Jenkins' Claim (1906), 2 Ch. 390.

In section 6 of the Companies Act, 1900 (sec. 87, Act 1908, page 495)—which provides that 'any contract made by a company' (registered after 1900, and inviting the public to subscribe for its shares) 'before the date at which it is entitled to commence business, shall be provisional only, and shall not be binding on the company until that date, and on that date it shall be binding'—the word 'provisional' means that the con-

tract is to be read as if it contained a provision that it should not be binding on the company unless and until the company became entitled to commence business.

The section applies to all contracts of a company, whether preliminary or final, or in the course of carrying on its business.

Where, therefore, a company had gone into liquidation without having become entitled to commence business, a claim by a person resting on certain alleged contracts with the company, one part of the claim being for moneys paid for furnishing temporary offices for the company was disallowed.

In re West Yorkshire Darracq Agency, Ltd. (1908), W. N. 236.

The liquidator of a company applied for a balance order against a contributory, who raised the defence that the 'minimum subscription' referred to in secs. 4 and 10 of the Companies Act, 1900 (secs. 85 and 86, Act 1908, page 494), was not properly stated in the articles of association, or in the company's prospectus. Clause 8 of the articles provided as follows: 'If the company shall offer any of its shares to the public for subscription, the directors shall not make any allotment thereof unless and until at least 10 per cent of the shares so offered shall have been subscribed, and the sums payable on application shall have been received by the company; but this provision is no longer to apply after the first allotment of shares offered to the public for subscription has been made.' The company issued a prospectus offering shares for public subscription, and containing only the following statement as to the minimum subscription:—'The minimum subscription is fixed by the articles of association at 10 per cent of the shares offered.'

Neville, J., held that the statement was in each case sufficient. There was a statement of an amount, which was ascertained as soon as it was known what shares the directors were offering for public subscription. The real intention of sec. 4, taken with sec. 10, was that the public, when they were asked to subscribe for shares, should be notified what was the minimum subscription on which the directors could proceed to allotment. In the present case the public was sufficiently notified, and the defence set up failed.

In re National Motor Mail-Coach Co., Anstis' and McLean's Claims (1908), 2 Ch. 228.

Where a cheque for application money for shares forming part of the minimum subscription for allotment is received on the day of allotment, but not paid into the company's bank until some days later, the application money cannot be treated as 'paid to and received by the company' before allotment within sec. 4 of the Companies Act, 1900 (sec. 85, Act 1908, page 494), although the cheque is duly honoured. *Mears v. Western Canada Pulp and Paper Co.* (1905), 2 Ch. 353, 360, applied. *Glasgow Pavilion, Ltd., v. Motherwell* (1903), 6 F. 116, distinguished.

Section 5 (sec. 86, Act 1908, page 495), which renders an allotment to an applicant in contravention of sec. 4 'voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later,' does not require actual legal proceedings to be taken within the month as a condition of avoidance. Notice of avoidance within the month followed by prompt legal proceedings after the month is sufficient.

Semble, the notice need not specify the ground of avoidance. *Burton v. Bevan* (1908), 2 Ch. 240.

A company issued a prospectus offering 20,000 preference shares to the public and stating that no allotment would be made unless 15,000 shares had been applied for and the application money paid. The plaintiff applied for 100 shares. The directors proceeded to allotment when 15,000 shares had been applied for, but in some cases the application money had only been paid by cheques which had not been cleared. The plaintiff paid the full amount of his shares. The company went into liquidation, and it then appeared that the company was insolvent and the shares worthless. The plaintiff brought this action against one of the directors, claiming repayment of the money paid on application for the shares under sec. 4 and compensation for loss under sec. 5 of the Companies Act, 1900 (secs. 85 and 86, Act 1908, page 494). The defendant was not present at the meeting of the board at which the allotment was made, but was present at subsequent meetings at which the minutes were confirmed and a resolution passed to apply for a certificate to commence business:—

Held, that *Mears v. Western Canada Pulp and Paper Co.* (1905), 2 Ch. 353, having decided that payment by cheque is not payment within sec. 4 of the Companies Act, 1900 (sec. 85, Act 1908, page 494), until the cheque is cleared, there had been a contravention of the Act.

Sec. 4 (sec. 85, Act 1908) applies only before allotment. After allotment is once made, whether in contravention of the Act or not, it is only voidable at the option of the shareholder, and the company cannot pay back the application money; the only liability of the directors after allotment is the liability to make good the loss under section 5, sub-sec. 2 of the Act (sec. 86, Act 1908). Under that section, 'knowingly contravene' means contravene with knowledge of the facts. A director cannot escape liability by ignorance of the law.

But a director does not make himself responsible for an act done at a meeting at which he was not present, and which is complete without further confirmation, merely by voting at a subsequent meeting for the confirmation of the minutes.

Held, also, on all the evidence, that the defendant was not aware of the facts and had not knowingly contravened the Act.

Roussell v. Burnham (1909), 1 Ch. 127.

The expression 'the prospectus' in sec. 4, sub-secs. 1, 4, of the Companies Act, 1900 (sec. 85, Act 1908, page 494),

means that document offering capital to the public upon the basis of which the applicant has actually subscribed.

The statement of the minimum subscription on which the directors may go to allotment, which the section requires to be inserted in the prospectus, must be an express statement, and not one which can be implied from other statements in the prospectus.

Barrow v. Paringa Mines (1909), Limited (1909), 2 Ch. 658.

In 1909 a limited company was formed having by its memorandum a power to pay out of its funds all expenses incident to its formation and the issue of its capital, including commissions for underwriting shares whether issued for cash or credited as partly paid; and clause 8 of its articles provided that the company might pay a commission at a rate of not exceeding 25 per cent on the amount unpaid on any shares to any person in consideration of his subscribing or agreeing to subscribe for shares. The capital of the company was divided into shares of 5s. each.

The formation of this new company was part of a scheme for the reconstruction of an old company of the same name that was to go into liquidation for the purpose, and it was also a part of the scheme that the liquidator should sell the undertaking of the old company (whose capital had been issued in shares of 5s. each) to the new company for a certain number of shares in the new company credited with 6d. paid up per share to be offered to the shareholders of the old company share for share. The new company to ensure working capital and before contracting to purchase the undertaking of the old company, entered into an agreement with certain parties called 'contractors,' which recited the scheme and provided (clause 2) that, if the shareholders of the old company should not within a certain period apply for 400,000 shares in the new company credited with 3s. 6d. paid per share, the liquidator should endeavour to sell to other persons such of the 400,000 shares as should not be so applied for, and if the liquidator should be unable to sell all the said shares within three days after the expiration of such period, the contractors would within three days thereafter (1) purchase at a price to be agreed, not exceeding $\frac{1}{2}$ d. a share, so many of the said shares as should not be so applied for by the shareholders of the old company or sold by the liquidator; (2) apply to the new company for an allotment of the same; (3) pay the sum of 3d. per share on application for the same; and (clause 3) that when the whole of the 400,000 shares should have been applied for by shareholders of the old company or by purchasers or by the contractors, and the moneys payable on application should have been received, then the liability of the contractors under clause 2 should cease, and the new company should thereupon pay the contractors 'a sum equal to 10 per cent upon £30,000, the amount of the cash assessment on the said 400,000 shares.' No prospectus of the new company had been issued offering any of

its shares to the public for subscription. In an action to restrain the carrying out of the agreement as being *ultra vires* the new company:—

Held, that the agreement was a valid underwriting agreement within sec. 89 of the Companies (Consolidation) Act of 1908, page 496.

In re Wimbledon Olympia, Ltd. (1910), 1 Ch. 630.

The mere fact that a prospectus issued by a company does not contain some of the facts or contracts required to be stated by sec. 81 of the Companies (Consolidation) Act, 1908, does not entitle the person who has taken shares on the faith of the prospectus to rectification of the register. The difference of the wording of that section and section 38 of the Companies Act, 1867, has not in this respect altered the law.

Dominion of Canada General Trading and Investment Syndicate v. Brigstocke (1911), 2 K. B. 648.

Section 89 of the Companies (Consolidation) Act, 1908, which prohibits (except under the conditions therein specified) the payment by the company of a commission to any person in consideration of his subscribing or procuring subscriptions for shares in the company, applied as well to private as to public companies.

In re Christineville Rubber Estates, Ltd. (1911), W. N. 216.

The applicant asked for an order for the rectification of the register of members of the respondent company by the removal of his name as a shareholder, on the ground of misrepresentation in the prospectus. The respondents admitted misrepresentations, but Eve J. held that, so far as the case was based on the misrepresentations relied upon by the applicant at the time when he launched the motion, it failed on the ground of *lâches* in commencing proceedings. The only point upon which the case is thought to call for a note is the following: On the hearing of the motion it was argued that there was another ground upon which the applicant was entitled to succeed, and in regard to which he had no certain knowledge when he instituted the proceedings in December, 1910. The facts relevant to that issue were these: The property, the subject-matter of the prospectus (a rubber and produce estate), which the respondents had acquired in February, 1910, as a going concern, from a syndicate for £51,250, had been purchased in November, 1909, by a Mr. Badams (who on the nomination of the syndicate was appointed a director of the respondent company) for £1,000, and had been sold and transferred by him to the syndicate on the day before it was sold to the company, the consideration being half the capital of the syndicate. In the prospectus the contracts between Badams and the syndicate and between the syndicate and the company were stated, and the extent of Badams' interest in the capital of the syndicate was disclosed, but no mention was made

of the fact that Badams had purchased the property three or four months previously for £1,000.

Eve J. (in the course of a written judgment): 'I have grave doubts whether it is open to the applicant to raise this case at all. His motion to rectify is not based on any fraudulent concealment on the part of the company, but is in terms based on misrepresentations in the prospectus. There must be something more than mere non-disclosure proved before misrepresentation is established—it must, I think, be shewn that the non-disclosure is the non-disclosure of something the disclosure of which would falsify some statement in the prospectus. The applicant has not attempted to point out any statement in the prospectus which is falsified by the fact that Mr. Badams had purchased the same property in November, 1909, for £1,000, nor has he tendered any evidence proving that this fact was known to any agent of the company responsible for the issue of the prospectus except Mr. Badams. It is not sufficient for him to say—what indeed is quite credible—that, had he been told that the property for which the company was giving £51,000 and upwards had changed hands three months previously for £1,000, he would not have applied for shares. When he comes to the Court to be relieved of his shares on the ground of misrepresentation arising from non-disclosure, he must be prepared to put his finger on the statements which he relies upon as contradictory of, or inconsistent with, the facts not disclosed. This the applicant has failed to do, and, although it may be that in other circumstances the astounding difference between the prices of November, 1909, and February, 1910, might have entitled him to some relief, I do not think it does so in these proceedings. I will only add that, had I arrived at a different conclusion on this part of the case, I think the applicant, who was certainly put upon inquiry in June, 1910, as to the price at which the property had been acquired by Badams, has quite failed to give any reasonable explanation of the delay which arose between that date and the end of November, when for the first time he set on foot an investigation which almost at once disclosed the two prices. I dismiss the motion with costs.

In re South of England Natural Gas and Petroleum Co.
(1911), 1 Ch. 573.

In February, 1910, a prospectus was issued on behalf of a company headed 'For private circulation only,' but also containing a statement that it had been filed with the Registrar of Joint Stock Companies. It was stated that this prospectus was distributed by the promoter only to shareholders in certain gas companies in which he was interested, and not more than 3,000 copies were sent out. In April, 1910, a second prospectus was issued which contained no statement of the first offer of shares. B. applied for and was allotted shares on the terms of the second prospectus. He died soon afterwards. His executors moved to rectify the register by removing his name

on the ground that there was a breach of sec. 81 of the Companies (Consolidation) Act, 1908, page 489, in not stating the offer of shares contained in the first prospectus and the amount subscribed:—

Held, on the evidence, that the circulation of the first prospectus was an offer of shares to the public within the meaning of the Act of 1908. Consequently the second prospectus was a 'subsequent offer' within sec. 81 of the same Act and the first offer ought to have been stated.

But held that the remedy of the allottee was in damages against the persons responsible for the prospectus and not by rescission. In *re Wimbledon Olympia, Ltd.* (1910), 1 Ch. 630, followed.

In *re Orleans Motor Co.*, (1911), 2 Ch. 41.

The object of sec. 212 of the Companies (Consolidation) Act 1908, was to prevent insolvent companies from creating floating charges to secure past debts or moneys which do not go to swell their assets and become available for creditors.

The term 'cash' in sec. 212 is not to be interpreted by the light of the decision as to the meaning of that term in sec. 25 of the Companies Act, 1867.

Where moneys are advanced to reduce the liability of a company under an antecedent independent guarantee, debentures giving a floating charge created by the company in favour of the guarantors, who find money to pay off the debt owing by the company and guaranteed by them, are, if the company goes into winding-up within three calendar months after the issue of the debentures, invalid unless it is proved that the company was solvent immediately after the creation of the charge.

Quaere whether it necessary to register under sec. 93 of the Act an agreement by a company to give a debenture containing a floating charge on its assets, where no debenture has actually been issued.

Ladneburg & Co., v. Goodwin, Ferreira & Co., Ltd., and Garnett, (1912), 3 K. B. 275.

The defendant company carrying on business as merchants in Manchester, consigned goods to their customers in South America, and, in order to obtain advances from the plaintiffs, who were bankers, wrote to the plaintiffs enclosing for their acceptance the company's drafts drawn in respect of specified shipments then being made and copies of the bills of lading and of the invoices relating thereto, and stating that the defendant company hypothecated the goods or the proceeds thereof to the plaintiffs. As between the defendant company and their customers the terms of sale were such that the property in the goods passed on shipment to customers to whose orders the bills of lading were drawn. The plaintiffs having accepted drafts in the above circumstances, and the defendant company having gone into liquidation, the plaintiffs claimed to be entitled to the proceeds of the goods as against the liquidator:—

Held, that the effect of the transaction was that the defendant company created a charge on the company's debts within sec. 93, sub-section 1 (e), of the Companies (Consolidation) Act, 1908, page 497, which charge, not having been registered as required by the section, was void as against the liquidator, and that the plaintiff's claim, therefore, failed.

Hoare v. British Columbia Development Association (1912)
W. N. 235.

The British Columbia Development Association, which was incorporated in 1904, issued in 1906 £100,000 debenture stock, the repayment of which, with interest at five per cent, was secured by a trust deed of the usual description, dated November 13, 1906, and creating a floating charge upon all the assets and property of the company. By a deed of the same date made between the company of the one part and the debenture trustees of the other part (hereinafter called the first deed of covenant), after reciting that the company was negotiating a scheme for purchasing, developing and disposing of a large tract of land from two railway companies therein named, and that they had issued the £100,000 debenture stock for the purpose of getting fresh capital, and that it had been agreed that the first deed of covenant should be executed for the purpose of securing further benefits to allottees, the company covenanted to pay to the trustees one-fourth of all profits made by the company out of its transactions with the railway companies, and the company charged all its rights and interests present and future, under or by virtue of any such arrangement or scheme as aforesaid, and all profits made by the company thereunder with the payment to the trustees of the share of profits covenanted to be paid; and the company agreed that they would issue to every allottee of debenture stock a certificate entitling him or the registered holder of such certificate to a total bonus under the terms of the first deed of covenant, equal to the amount of stock allotted to him.

By an indenture dated May 22, 1907, hereinafter referred to as the second deed of covenant, the company charged with the payment of the bonuses secured by the first deed of covenant one-fourth of the profits of other schemes for acquiring and developing land. Bonus certificates were issued in pursuance of these deeds, and in course of time the bonus certificates had come to be held by other persons than the holders of debenture stock. Neither of the deeds of covenant was registered within twenty-one days of execution, pursuant to sec. 14 of the Companies Act, 1900. The company having made default in payment of interest on the debenture stock, this action was brought by a holder of debenture stock against the company, the trustees, and a holder of bonus certificates asking for a declaration that no valid charge upon any of the property or assets of the company ranking in priority to the debenture stock was created by the first or the second deed of covenant, for a receiver, and to have the trusts of the debenture

trust deed carried into execution. A receiver had been appointed on motion:—

Held, that these deeds of covenant required registration as (1) they created a charge for the purpose of securing the issue of debenture stock within sec. 14 (a) of the Act of 1900. (2) They were floating charges within sec. 14 (d). The deeds were therefore void for want of registration.

In re Kent Outcrop Coal Co. (1912), W. N. 26.

Petition by three out of seven signatories of the company for a compulsory winding-up order on the ground that the company had made default in filing the statutory report or holding the statutory meeting. This was first made a ground for winding up by sec. 12 (8) of the Companies Act, 1900, repeated in sec. 129 (2) of the Act of 1908; but sec. 65 (9) of the latter Act provides that 'If a petition is presented to the Court in manner provided by Part IV. of this Act for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.' This was the first time a petition had been presented on this ground since the passing of the Companies Act, 1908. There was no opposition.

Neville J. made the order.

69. I wish again to point out that the first method of control and promotion of companies, namely the 'Blue Sky Law' of Kansas method, was fully considered by the Departmental Committee of the Board of Trade and summarily disposed of. The main ground for this decision is set out in paragraph 42, Appendix 'S,' page 473, as follows:—

'It would be an attempt to throw what ought to be the responsibility of the individual on the shoulders of the State, and would give a fictitious and unreal sense of security to the investor, and might also lead to grave abuses.'

The French, German and Illinois methods were also fully considered, and after due deliberation it was decided that due publicity with an adequate means in the hands of the investor for investigation before investing, and means thereof of ascertaining that he has been fairly dealt with and that the enterprise is launched in a businesslike way affords the best means of protection to the public.

New Jersey
legislation.

70. The New Jersey legislation passed at the last session of the Legislature for the purpose of amending the company law of that State is also worthy of consideration, Appendix 'U,' page 807. The purposes and objects of this legislation are set out in the message of President Woodrow Wilson, at that

time Governor of the State of New Jersey, in his annual message to the Legislature, on the 14th of January, 1913:—

‘The corporation laws of the State notoriously stand in need of alteration. They are manifestly inconsistent with the policy of the federal government and with the interests of the people in the all-important matter of monopoly, to which the attention of the whole nation is now so earnestly directed. The laws of New Jersey as they stand, so far from checking monopoly, actually encourage it. They explicitly permit every corporation formed in New Jersey, for example, to purchase, hold, assign, and dispose of as it pleases the securities of any and all other corporations of this or any other State and to exercise at pleasure the full rights of ownership in them, including the right to vote as stockholders. This is nothing less than an explicit license of holding companies. This is the very method of forming vast combinations and creating monopoly, against which the whole country has set its face; and I am sure that the people of New Jersey do not dissent from the common judgment that our law must prevent these things and prevent them very effectually.

Governor
Wilson's
message.

‘It is our duty and our present opportunity to amend the statutes of the State in this matter not only, but also in such a way as to provide some responsible official supervision of the whole process of incorporation and provide, in addition, salutary checks upon unwarranted and fictitious increases of capital and the issuance of securities not based upon actual bona fide valuation. The honesty and soundness of business alike depend upon such safeguards. No legitimate business will be injured or harmfully restricted by them. These are matters which affect the honour and good faith of the State. We should act upon them at once and with clear purpose.’

Chapter 15 is an amendment to the then existing law which authorized any corporation to purchase property ‘necessary for its business and to issue stock to the amount of the value thereof in payment therefor,’ and ‘in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive.’ This is in effect a Statutory enactment of the law as deduced from the decisions of the courts in England. See *Laroque v. Beauchemin*, *Spargo's Case* and *Fothergill's Case*, page xi. As amended this section now provides that when property is purchased the purchasing company must receive in property or stock what the same is ‘reasonably worth’ in making a fair bona fide valuation, and that no stock shall be issued for profits not yet earned but only anticipated. Whether this makes an actual change in the law or not depends upon the interpretation which the Court may put upon the section. It seems to add very little to the law to say that a transaction must be bona fide when it formerly said that it must not be fraudulent.

Objects of
legislation.

lent. If a transaction is not fraudulent, it surely must be bona fide. The section also provides that shares of another corporation may be purchased only when the property of that company is cognate in character, and such property is intended to be used by the purchasing company in the direct conduct of its own particular business. This provision is plainly intended to prevent the formation of holding companies and to restrict the control of one corporation by another within the narrowest limits.

Chapter 18 also bears upon this subject. Another limitation is added by this section, which provides that when the shares of one company are issued on the basis of shares of another, such issue shall not be for an amount greater than the amount the purchasing company actually pays for the shares in cash or its equivalent. Where shares are issued for payment of assets, the directors are obliged to file a statement showing that the property has been purchased and the amount actually paid therefor.

Chapter 17 makes provision for the merger or amalgamation of companies.

Chapter 18 provides a more extensive limitation upon holding companies and other similar forms of control through the acquisition of shares. The exceptions are shares in non-competing companies, temporary investments of surplus earnings, and the investment of special trust funds.

Chapter 19 provides for supervision of all mergers or amalgamations by the Public Utilities Commission of the State.

Shares without
the dollar
mark.

71. This memorandum would be deficient without some mention of companies with shares 'not having the dollar mark,' that is with shares issued not to represent \$100.00 each, or in some other denomination, but to represent an undivided share or interest in the undertaking and profits of the Company. An example is given in Appendix V, page 515, where the certificate of incorporation of the Wisconsin Edison Company incorporated under the laws of the State of New York, is set out reprinted from the Journal of the Corporation Trusts Company, New York. In that case the capital with which the Company may carry on business is fixed at \$12,000,000, and it is provided by Section 20 of the Statute under which the Company is incorporated (Appendix V, page 511) that the Company shall not 'begin to carry on business or incur any debts until the amount of capital stated in its certificate of incorporation has been fully paid in money or in property taken at its actual value.'

The number of shares provided by the articles is 300,000, of which 100,000 are preference shares of \$100.00 each—and 200,000 without par value. If the preference shares are sold at their face value the proceeds amounts to \$10,000,000, and the aggregate value of the ordinary shares amounts to \$2,000,000, and the divisible value of each share \$10.00. The last clause of sec. 19, sub-sec. 2 of the Statute, page 511, provides that the shares may be sold at any price fixed by the Board. The well known rule that a sale of shares at a discount is done away with. It is unlikely that the preference shares would be sold at less than their face value, since they are redeemable at 115. Under such circumstances the ordinary shares must be sold for at least \$10.00 in order to provide the capital sum required in order that the Company may commence business. But these shares may be sold at any advance up to this sum. After payment of a dividend upon the preference shares the balance of the profits would be divisible amongst the ordinary shareholders; and if all such shares were issued each ordinary share would be entitled to one—one hundred thousandth of such profits. Similarly on a liquidation each share would be entitled to the divisible balance of the assets after payment of the preference shares. In 1892 shares without the dollar mark were discussed before the Bar Association of the State of New York. This method was introduced in a proposed Federal Incorporation Act during the year 1910, Senate Bill 6186. The Hadley Commission highly recommended it in their report Appendix M, page 430. It is stated that the method is adopted from the German incorporation Statute. This I am unable to certify.

72. The following is an article which appeared in the *Harvard Law Review*, June 1913, by Mr. Victor Morowetz, a member of the New York Bar Association which reported on the subject:—

SHARES WITHOUT NOMINAL OR PAR VALUE.

A Joint-Stock corporation necessarily must have some capital, and it must have shareholders and, for obvious reasons of policy, it is desirable that the amount of capital which a corporation must have before incurring indebtedness and which may not be impaired by the declaration of dividends should be fixed definitely by its charter or articles of association. However, it is not necessary that the amount of capital should be fixed by reference to the nominal or par amount of the shares issued by the corporation, and it is not necessary that the shares should purport to represent specified sums of money contributed to the capital.

Mr. Morowetz' papers.

The customary scheme of corporate organization, under which the capital of the corporation is supposed to be fixed by the nominal or par amount of its outstanding shares and the shares are supposed to represent specified sums contributed to the capital, has not worked well in practice, except as applied to corporations, like banking corporations, whose business is to deal in money, credits, and securities, and whose assets are kept in liquid form. In most cases, the capital, or a large part of the capital, of a corporation is invested permanently in fixed plant or machinery which cannot again be converted into cash, and whose value, in great measure, depends upon the profitability of the company's business. For many years the custom has prevailed of issuing paid-up shares of such corporations in consideration of property taken at a valuation largely in excess of its money value. Under the laws of some of the states neither the subscription nor the payment of the whole amount of the nominal share capital of a corporation is a condition precedent to its right to engage in business and to incur debts. In some cases corporations have even been authorized by law to issue their paid-up shares at a discount, or, in other words to disregard the statements in the charter and in the share certificates as to the amount of the company's capital and the amount of the several shares. Moreover, some corporations are formed to invest their capital in wasting properties, like mines, and to redistribute among their shareholders the proceeds of these properties without making a suitable reserve for depreciation. For these reasons the nominal amount of the capital of a corporation, other than a banking corporation, rarely indicates the amount of its actual capital, or the amount originally contributed by its shareholders.

It often happens that a corporation having an established business finds itself in need of capital and desires to raise the required capital by selling additional shares at their market value. However, if the market value of the shares should be less than their nominal or par amount, the corporation would be precluded from raising money by selling shares, inasmuch as they could not be issued lawfully for less than their nominal or par amount, while, of course, no one would be willing to pay more than their actual or market value. The corporation thus would be forced to raise the required capital by borrowing and increasing its indebtedness, although it would be sound business policy and in the interest of its creditors as well as its shareholders to raise the needed capital by selling shares at their market value.

To meet such a situation, and also to obviate the supposed evils of 'stock watering,' a statute was passed in New York for the creation of corporations with shares having no nominal or par value. A corporation formed under this statute must state in its certificate of incorporation the amount of capital with which it will carry on business, and it is prohibited from engaging in business or incurring debts until the stated amount

of capital shall have been received by the corporation in money or in property at its actual value. However, the shares issued by the corporation would have no nominal or par value, and the corporation would be permitted to issue and sell them at their actual or market value.

The policy of the New York statute is sound. It recognizes that shares in a corporation represent only aliquot interests in its capital, whatever that may be, and that their nominal or par value is no indication of their actual value or of the actual capital of the corporation. It requires the amount of the actual capital of a corporation formed under the law to be stated in the certificate of incorporation, and imposes a severe penalty upon the directors in case of the creation of indebtedness before receiving the prescribed capital. Thus it furnishes to creditors and to the public generally a measure of protection greater than that furnished by the generally prevailing incorporation laws. At the same time it is in furtherance of sound business methods by enabling corporations to raise money by selling shares at their actual value instead of by borrowing or otherwise increasing their indebtedness.

VICTOR MOROWETZ.

New York City.

73 The following is an extract from the evidence given by Mr. Francis Lynde Stetson, a prominent lawyer of New York city, given before the Industrial Commission in the year 1899. This evidence appears in the preliminary Report of the Commission on Industrial Combinations, at page 976 of the first volume of the Report:—

A REMEDY FOR STOCK WATERING.

Q. It was simply a scheme to make money?—A. No; I don't say that. My point is this, that nothing is more illusive and delusive than the idea that if a corporation's stock be only paid in in money at the outset it is therefore better off than one that has issued its stock for property that could not be converted for 1 cent on the dollar. The question is what assets the corporation has got at the time of the particular transaction, and that can be ascertained only by present inquiry.

Q. (By Senator Mallory.) Have you any suggestions to offer?—A. I had only one point which I thought proper. I have not obtained information, but only impressions, as to what was going on in this commission from the public prints. In January, 1892, a report was made by a committee, of which I was a member, on the question of corporations, to the Bar Association of New York; and the third provision of that report is the only one, I think, that I should like to bring before this commission for its consideration. As it is addressed to a subject about which a great deal of complaint has been

Mr. Stetson's
views.

made, namely, stock watering, I should like to indicate a remedy or relief which we thought was desirable (reading):

‘Third. To permit the formation of a distinct class of business stock corporations whose capital stock may be issued as representing proportional parts of the whole capital without any nominal or money value.

‘The effect of such amendment would be to provide for the measurement of the interest or shares of the members of such a corporation by a statement of proportion, as in case of the part owners of a ship, and not by an arbitrary assignment of money value, which is delusive in the case of every corporation whose capital stock has a market value either more or less than its nominal par value.

‘Such an amendment, though somewhat radical, is not altogether novel. It embodied a principle adopted in corporation laws in Germany.

‘It would relieve any possibility of injury to the public from misleading representations as to the money value of corporate stock, and would also relieve from embarrassment conscientious corporate officers often compelled to deal with legal fiction as to which they have no personal knowledge, as though it were a reality within their own observation.’ (Proceedings of New York State Bar Association, January, 1892, page 138.)

Q. (By Mr. Farquhar.) Do you choose to amplify that in any way further than you have presented it?—A. I think that states the case.

PURPOSE OF ISSUING LARGE CAPITAL STOCK.

Q. Will you state the circumstances that brought this about? How many were concerned in it?—A. That was never acted upon; it was merely presented as a report and never followed up. But the real desire of corporate management of stockholders is not always fully understood. The real desire of the issue of large capital stock is generally to get a very large common divisor and to get as many persons interested in the enterprise as may be, and the nominal amount of each share is of very slight consequence. You will see \$100,000,000 of stock issued and the next day after it goes on the stock exchange it sells for from \$10 to \$12 a share. Nobody supposes that stock is worth \$100,000,000. The total stock is only worth \$10,000,000 to the public at large, if it expressed its opinion about it, and its par value becomes immediately a fiction. On the other hand, the Central Trust Company stock of New York, say, sells at \$1,500. That is just as much a fiction; it is just as factitious to say that it is \$100 stock as it was in the other case to say that the \$13 stock was \$100 stock. No one deals with reference to par; they all deal with reference to the fact. Now, as the fact in many of these cases is obscured by this assignment of a nominal or par value, under this theory of freedom of contract, I would permit a corporation to say, “Here are our shares; we have so many shares and you have

such a proportion of the property, be it worth more or less." Then dividends need not be made by per cent, but as they are in the case of mining companies—so much a share—and there would be no one deceived, and every purpose would be accomplished that I can think of that is desired by the creation of these large nominal capitals.

THE LINE BETWEEN PUBLIC AND PRIVATE CORPORATIONS.

Q. You made a distinction some time ago between public and private corporations, and intimated that the railroads, telegraphs, and corporations of that kind were public and that all manufacturing corporations were private; the suggestion has been made many times here that a corporation, such as the American Sugar Refining Company, which I have taken as a special example, that manufactures about 90 per cent of the output of sugar, according to the testimony given here, so affects the interests of the public that it should be considered a public corporation. The competition against that is no more vigorous, it is suggested, than the competition against railroads and telegraphs, and therefore any restraints put on railroads might very properly apply to any manufacturing company that controls so large a proportion of the manufacture in any one line as that, for example. Can you draw the line sharply between public and private corporations?—A. I think I can. I think the American Sugar Refining Company is not a public corporation. At the trust conference I see it reported that Professor Clark, of Columbia, said that combinations might deal with the competition of all the mills that were built, but can not deal with the competition of the unbuilt mills. Notwithstanding Mr. Havemeyer's greater familiarity with the matter, I venture to say Mr. Arbuckle will 'cut some ice' if he has not done it yet, and you will find that if the American Sugar Refining Company does not keep down the price of its commodity to a reasonable point, Mr. Arbuckle will find great success in that department of his industry. The natural law will work better than the interference of positive legislation.

RIVALRY BETWEEN CORPORATIONS AND INDIVIDUALS.

Q. With reference to the degree of publicity that should be given to a corporation like the American Sugar Refining Company, I understood you to say that much publicity would be unfair on account of the fact that it would have rivals whose affairs would not be made public. What would you say if there was a general law providing that all corporations should be given an equal degree of supervision; it would not be unjust then?—A. I am not speaking of rivalry between corporations, but between corporations and individuals engaged in the same business.

Q. You think it would be impossible to exercise the supervision over the individual?—A. You could not do that; you have no right to do that. If a man is not violating the law you can not inquire how he is investing his property here and there, and that is all that inquiry means. You do not go and call on a person and ask how his health is; but what they owe, what they have, and how they made it.

THE DEVELOPMENT OF BUSINESS WILL BREAK ALL FETTERS.

Q. Do you think if at the present time there were such rigid laws it would drive capital out of the corporate form into the hands of men acting as partners or private individuals?—A. I do not know that it would. I am not equal in ingenuity to the task of determining how the positive growth and development of business is going to meet the embarrassments and fetters which legislators are trying to put on it, but it will. It will come in some way or other no matter how many embarrassments are put upon it it will come in time.

74. Through the courtesy of the Corporation Trust Company of New York I am able to set out copies of the share certificate of the Wisconsin Edison Company.

PREFERRED SHARE CERTIFICATE.

Form of
certificate
without the
dollar mark.

Number Shares 100.
Incorporated Under the Laws of the State of New York.

THE WISCONSIN EDISON COMPANY,
Incorporated.

Preferred Stock, \$10,000,000, Divided into 100,000.
Shares of the Par Value of \$100 each.
Common Stock 200,000 Shares without Par Value.

THIS CERTIFIES THAT
is the owner of—ONE HUNDRED—shares of the PREFERRED stock of the Wisconsin Edison Company, Incorporated, full paid and non-assessable, transferable on the books of the Company by the holder in person or by attorney, upon surrender of this certificate duly endorsed. The holders of the preferred stock are entitled to cumulative dividends thereon at the rate of Six Dollars (\$6- per share for each and every fiscal year of the life of the corporation and no more, payable out of any and all surplus or net profits, quarterly, half-yearly, or yearly, as and when declared by the Board of Directors, before any dividends shall be declared, set apart for or paid upon the

common stock. The preferred stock shall not be entitled to participate in any other or additional earnings or profits of the corporation. In the event of the dissolution or liquidation of the Company or a sale of all its assets (whether voluntary or involuntary) or in the event of its insolvency, or upon any distribution of its capital, there shall be paid to the holders of the preferred stock the sum of One Hundred dollars (\$100) per share, and the amount of all unpaid accrued dividends thereon, before any sum shall be paid, or any assets distributed among the holders of the common stock and after such payment to the holders of the preferred stock, the remaining assets and funds of the corporation shall be divided among and paid to the holders of the common stock according to their respective shares. After providing for payment of all accumulated dividends upon the preferred stock, the Board of Directors may declare and pay dividends on the common stock concurrently with dividends on the preferred stock, for any dividend period of any fiscal year when such dividends are applicable to the common stock. The whole of the preferred stock may be redeemed on any dividend day at the option of the Board of Directors, upon sixty (60) days' notice by mail to the holders of record of said stock, by paying for each share of the preferred stock One hundred and fifteen dollars (\$115) in cash, and in addition thereto all unpaid dividends accrued thereon at the date fixed for such redemption. No preferred stockholder shall be entitled to subscribe for, purchase or receive any part of any new or additional issue of stock or of any issue of bonds or debentures convertible into stock. This certificate is not valid until countersigned by the transfer agent and registered by the Registrar.

IN WITNESS WHEREOF, the said Company has caused this certificate to be impressed with its corporate seal and signed by its President or a Vice-President and its Treasurer or an Assistant Treasurer, this day of 19...

.....
Treasurer.

.....
President.

Registered:

THE EQUITABLE TRUST COMPANY
OF NEW YORK,

Registrar.

By,

.....
Asst. Secretary.

Countersigned:

THE WISCONSIN EDISON COMPANY,
Incorporated.

By,

.....
Transfer Agent.

COMMON SHARE CERTIFICATE.

Number

Shares 100.

Incorporated Under the Laws of the State of New York.

THE WISCONSIN EDISON COMPANY,

Incorporated.

Preferred Stock, \$10,000,000, Divided into 100,000.

Shares of the Par Value of \$100 each.

Common Stock 200,000, Shares without Par Value.

THIS CERTIFIES THAT
is the owner of —ONE HUNDRED—shares of the COMMON stock of the Wisconsin Edison Company, Incorporated, full paid and non-assessable, transferable on the books of the Company by the holder in person or by attorney, upon surrender of this certificate duly endorsed. The holders of the preferred stock are entitled to cumulative dividends thereon at the rate of Six dollars (\$6) per share for each and every fiscal year of the life of the corporation and no more payable out of any and all surplus or net profits, quarterly, half-yearly, or yearly, as and when declared by the Board of Directors, before any dividends shall be declared, set apart for or paid upon the common stock. The preferred stock shall not be entitled to participate in any other or additional earnings or profits of the corporation. In the event of the dissolution or liquidation of the Company or a sale of all its assets (whether voluntary or involuntary) or in the event of its insolvency, or upon any distribution of its capital, there shall be paid to the holders of the preferred stock the sum of one hundred dollars (\$100) per share, and the amount of all unpaid accrued dividends thereon, before any sum shall be paid, or any assets distributed among the holders of the common stock; and after such payment to the holders of the preferred stock, the remaining assets and funds of the corporation shall be divided among and paid to the holders of the common stock according to their respective shares. After providing for payment of all accumulated dividends upon the preferred stock, the Board of Directors may declare and pay dividends on the common stock concurrently

with dividends on the preferred stock for any dividend period of any fiscal year when such dividends are applicable to the common stock. The whole of the preferred stock may be redeemed on any dividend day at the option of the Board of Directors, upon sixty (60) days' notice by mail to the holders of record of said stock, by paying for each share of the preferred stock One hundred and fifteen dollars (\$115) in cash, and in addition thereto all unpaid dividends accrued thereon at the date fixed for such redemption. No preferred stockholder shall be entitled to subscribe for, purchase or receive any part of any new or additional issue of stock or of any issue of bonds or debentures convertible into stock. This certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

IN WITNESS WHEREOF, the said Company has caused this certificate to be impressed with its corporate seal and signed by its President or a Vice-President and its Treasurer or an Assistant Treasurer, this day of 19...

.....
Treasurer.

.....
President.

Registered:

THE EQUITABLE TRUST COMPANY
OF NEW YORK,

Registrar.

By,

.....
Asst. Secretary.

Countersigned:

THE WISCONSIN EDISON COMPANY,
Incorporated.

By,

.....
Transfer Agent.

75. I have just discovered that there is now pending before the Congress of the United States a Bill introduced by Mr. Cullop (House Bill 7213), which provides that it shall be unlawful for a common carrier by railroad (a) to expend any money or incur any obligation or acquire any property in the construction, equipment, maintenance or operation or other legitimate improvement, extension or development of its railway or of the traffic of that railway; (b) to lease or purchase or acquire any interest whatsoever in any competing line by railway or water or in the securities thereof, or to guarantee the securities of or to consolidate with such line, and (c) to

Pending
United States
legislation.

issue stocks, bonds or other evidences of indebtedness without first obtaining permission of the Interstate Commerce Commission, or to expend any money realized from the issue of such stocks, bonds or evidences of indebtedness for any other purpose than that specified in the Order of the Commission permitting the issue. How far the Bill has advanced and whether it is likely to pass, I have not been able to ascertain.

All of which is respectfully submitted,

THOMAS MULVEY,
Under-Secretary of State.

THE CONTROL OF THE CAPITALIZATION

AND

BOND ISSUE OF COMPANIES

STATUTES, RULES AND REPORTS

REFERRED TO IN THE

MEMORANDUM OF THE UNDER SECRETARY OF STATE

THE CONTROL OF THE CAPITALIZATION

AND

BOND ISSUE OF COMPANIES

STATUTES, RULES AND REPORTS

REFERRED TO IN THE

Memorandum of the Under Secretary of State

APPENDIX A.

THE ONTARIO COMPANIES ACT, 2 GEO. V., CHAPTER 31.

PART XII.

COMPANIES OPERATING MUNICIPAL FRANCHISES AND PUBLIC UTILITIES.

151. This Part shall apply to all applications for incorporation of companies intended to operate or control any public or municipal franchise, undertaking or utility and which may require for its purposes the erection of any permanent structure in or upon any highway, stream or adjoining navigable waters, and to such companies when incorporated. 7 Edw. VII. c. 34, s. 154; 1 Geo. V. c. 17, s. 19, *part.*

152. With the application for incorporation the applicants shall produce to the Provincial Secretary:

- (a) Evidence that the proposed capital is sufficient to carry out the objects for which the company is to be incorporated; that such capital has been subscribed or underwritten, and that the applicants are likely to command public trust and confidence in the undertaking; Application of this Part of Act. Sufficiency of capital.
- (b) A detailed description of the plant, works and intended operations of the company, and an estimate of their cost; Description of plant, etc.
- (c) A by-law of every municipality in which the operations of the company are to be carried on, authorizing the execution thereof in the manner set out in such detailed description, where the consent of the council of the municipality is required by law to authorize the company to carry on its operations therein; Municipal by-law authorizing.
- (d) If the undertaking is to be carried on, or in so far as it is to be carried on, in territory without municipal organization, a report from the Minister of Lands, Forests and Mines approving of the undertaking; In unorganized territory, report of Minister of Lands, etc.
- (e) If it is proposed that the company shall acquire any plant, works, land, undertaking, good will, contract or other property or assets, a detailed statement of the nature and value thereof. 7 Edw. VII. c. 34, s. 155 Statement of plant, etc., to be acquired.

Further information.

(f) Such further information as the Provincial Secretary may require. *New.*

Referring application to engineers, etc., for report.

153. The Provincial Secretary may refer the application and all statements, evidence and material filed thereon to engineers, architects, valuers or other experts for consideration, investigation and report regarding the public necessity for the undertaking, the amount of capital required therefor, the value of any plant, works, lands, undertaking, good-will, contract or other property or assets to be acquired and any other matter which may appear to be in the public interest regarding the undertaking. 7 Edw. VII. c. 34, s. 156.

Letters Patent to be issued on Order-in-Council.

154. All Letters Patent and Supplementary Letters Patent of companies to which the provisions of this Part apply and of all companies heretofore incorporated for any of the purposes mentioned in section 151, shall be issued on the authority of the Lieutenant-Governor in Council, and such Letters Patent or Supplementary Letters Patent may be issued in terms and on conditions different from those applied for. 7 Edw. VII. c. 34, s. 157.

Notice of application.

155. Notices of the application shall be published in such manner and shall be given to such persons as the Provincial Secretary may determine. 7 Edw. VII. c. 34, s. 158.

Limitations in charter.

156. The Letters Patent or Supplementary Letters Patent, may limit the term of the existence of the company, the rate of dividend payable on the shares of the capital stock, the amount which the company may borrow on debentures, debenture stock, mortgages or other securities and the rate of interest thereon. 7 Edw. VII. c. 34, ss. 159, 160. *Amended.*

Proofs, etc., to be produced on application for Supplementary Letters Patent.

157. Upon an application for Supplementary Letters Patent extending the powers, increasing the capital or otherwise varying any term of the Letters Patent the company shall produce such evidence and statements as are referred to in section 152, and he may refer the same in the manner and for the purposes set out in section 153. 7 Edw. VII. c. 34, s. 161.

Supplementary Letters Patent, what may be contained in.

158. The Supplementary Letters Patent may fix the conditions upon which any shares, debentures, debenture stock or other securities of the company, therein authorized to be issued, may be allotted, sold or otherwise disposed of, and may be issued in terms and on conditions different from those applied for, and may vary any term or condition of the application. 7 Edw. VII. c. 34, s. 162.

Rights of municipality preserved.

159. No provision contained in this Part or in the Letters Patent or Supplementary Letters Patent, regarding the issue of debentures or other securities or the making of mortgages to secure the same shall in any way prejudice the right which any municipality may have to acquire or take possession of the plant and undertaking of the company. 7 Edw. VII. c. 34, s. 163.

Company may pass by-laws for control, etc., of undertaking.

160. The company may pass by-laws regarding the control and management of its undertaking, its dealings with the public, the collection of tolls, charges, rates or levies for the public service given by the company, and for the use, protection and care of its property

while being used, enjoyed or otherwise subject to public use; but no such by-laws shall have any force or effect or be acted upon until approved by the Lieutenant-Governor in Council and notice of the approval has been published four times in a public newspaper published at the place where the undertaking of the company is carried on, or as near thereto as may be, and in the *Ontario Gazette*. 7 Edw. VII. c. 34, s. 164.

(2) Every person who contravenes any of the provisions of any Penalty. such by-law shall incur a penalty not exceeding \$20.

161. In addition to the other returns which are required by this Additional or any other Act, the company shall on or before the 8th day of returns. February in each year make a report to the Provincial Secretary, verified as provided by subsection 4 of section 134, which shall specify.

- (a) The cost of the work, plant and undertaking of the com- What the report pany; is to contain.
- (b) The amount of its capital, and the amount paid thereon; Amount of capital.
- (c) The amount received during the year from tolls, levies, rates Tolls, amount and charges and all other sources, stating each separately; received from.
- (d) The amount and rate of dividends paid; Dividends paid.
- (e) The amount expended for repairs; and Description of any extension, etc.
- (f) A detailed description of any extension or improvement of the works or of any new works proposed to be undertaken in the current year, together with an estimate of the cost thereof. 7 Edw. VII. c. 34, s. 165.

162. The Provincial Secretary may appoint a person to inspect Inspection of and examine the books of account of the company, and every person books. so appointed may take copies or extracts from the same, and may require and receive from the keeper of such books, and also from the president and each of the directors of the company, and all the other officers and servants thereof, all such information as to such books and the affairs of the company generally, as the person so appointed deems necessary for the full and satisfactory investigation into and report upon the state of the affairs of the company, so as to enable him to ascertain the correctness of statement furnished by the company. 7 Edw. VII. c. 34, s. 167.

163. The Lieutenant-Governor in Council may, by Supplement- Existence of ary Letters Patent, extend the term of existence of any company company may be incorporated for a limited period under this or heretofore incor- extended by porated under any other general Act for such further period as by supplementary letters patent. Order-in-Council, made previous to the expiry of such period he may direct, and the provisions of this Act, relating to the expiration of the term of existence of a company shall thereupon apply to such term as so extended. 7 Edw. VII. c. 34, s. 168.

EXPROPRIATION.

164.—(1) A company to which this section is made applicable Expropriation. by the Letters Patent or Supplementary Letters Patent, may take,

without the consent of the owner thereof, lands and easements therein which may be necessary for the purposes of its undertaking, in like manner, as under the provisions of *The Ontario Railway Act*, lands may be expropriated for the purpose of a railway; but any such right of expropriation may be limited or the application of any section of that Act may be excluded. 7 Edw. VII. c. 34, s. 169.

Company heretofore incorporated.

(2) This section shall apply to a company heretofore incorporated under any general or special Act. 7 Edw. VII. c. 34, s. 170.

APPENDIX B.

THE REVISED STATUTES OF THE PROVINCE OF QUEBEC.

JOINT STOCK COMPANIES GENERAL CLAUSES.

5974.

Capital stock of joint stock companies.

1. The capital stock of all joint stock companies shall consist of that portion of the amount authorized by the charter, which has been bona fide subscribed for and allotted, and shall be paid in cash.

Amount paid in to be published.

2. The amount of paid up capital, from year to year, shall be published annually in a report to the shareholders.

What property accounts to represent.

3. The property accounts of a company shall represent only the amount of the actual bona fide outlay necessary for the undertaking.

Stock not to be issued for increased value.

No stock shall be issued to represent the increased value of any property. Any such issue shall be null and void.

Watering of stock forbidden.

4. The practice, commonly known as watering of stock, is prohibited, and all stock so issued shall be null and void.

Capitalization of surplus earnings forbidden.

5. The capitalization of surplus earnings and the issue of stock to represent such capitalized surplus, are also prohibited, and all stock so issued shall be null and void, and the directors consenting to such issue of stock shall be jointly and severally liable to the holders thereof for the re-imbursement of the amount paid for such stock.

Fictitious capitalization of stock forbidden.

6. Every form and manner of fictitious capitalization of stock in any joint stock company, or the issuing of stock which is not represented by a legitimate and necessary expenditure in the interest of such company, and not represented by an amount in cash paid into the treasury of the company, which has been expended for the promotion of the objects of the company, is prohibited, and all such stock shall be null and void. R. S. Q. 4668.

BORROWING POWERS.

5988.

Issue of notes authorized.

The company may, by resolution, issue notes, payable to order or to bearer, for the settlement of accounts or other current matters; it may further, on a resolution of two-thirds of the shareholders present at a meeting specially called for the purpose, issue

bonds or debentures to the amount of two-thirds of the total value of the immoveable property.

Issue of debentures authorized.

Such bonds or debentures, after their registration in the office or offices of the registration division or divisions in which the immoveables of the said company are situated (which immoveables must be described in a notice to that effect given to the registrar), constitute a privileged claim in favour of the holders thereof against the company, and give a right of preference over all other debts and claims against the company, posterior to the issuing of such bonds or debentures.

Privileges of debentures after registration.

To secure the payment of its bonds or debentures, the company may, by its duly authorized officers, grant to one or more trustees an hypothec upon the immoveable property of the company, mentioning the issue and the amount of the bonds or debentures secured thereby; and such hypothec shall, when duly registered, be a valid security in favour of the holders of such bonds or debentures, issued before or after the execution of such hypothec, notwithstanding article 2017 of the Civil Code. 2 Edw. VII. c. 30, s. 1; 4 Ed. VII. c. 33, s. 1.

Company may grant hypothec to secure payment of debentures.

Effects thereof when duly registered.

APPENDIX C.

PROVINCE OF NOVA SCOTIA.

CHAPTER 1.

An Act to Consolidate and Amend Chapter 1, Acts of 1909, 'An Act to Establish a Board of Public Utility Commissioners,' and Acts in Amendment thereof.

(Passed the 13th day of May, A.D., 1913.)

Section 1.—Title.

2.—Interpretation.

3.—Board, etc., how appointed.

4.—Commissioner not to be interested in any Public Utility, etc.

5.—Commissioner interested or absent.

6.—Commissioner, when not disqualified.

7.—Salary and expenses.

8.—Amount payable to Public Utility.

9.—Board's expenses to be borne by the Public Utilities.

10.—Amount assessed when payable.

11.—Payment by Governor-in-Council.

12.—Advances, how repayable.

13.—Vice-Chairman, when to act.

14.—Presumption as to Chairman.

15.—Quorum.

16.—Board may delegate commissioner to report.

17.—Vacancy not to affect Board.

18.—Public Utility to furnish adequate services and facilities.

- 19.—Equal tolls and rates, etc., to be charged.
- 20.—Every Public Utility and Telegraph Company to permit, under certain conditions, the use of its poles, etc.
- 21.—Board can compel compliance with Act.
- 22.—Proposed charges dealing with Public Utility to be submitted to Board.
- 23.—Valuation by Board.
- 24.—Board can require maps, reports, etc., to be furnished.
- 25.—Re-valuation can be made.
- 26.—Public Utilities to keep accounts and returns as Board orders.
- 27.—Board may prescribe form of books, etc., to be kept.
- 28.—Blanks to be prepared and supplied.
- 29.—Public Utility to have office in Province.
- 30.—Annual accounts to be kept and balance sheet filed.
- 31.—Board may examine and audit accounts.
- 32.—Depreciation account to be kept.
- 33.—Board may prescribe rules, etc., as to depreciation account.
- 34.—Depreciation to be allowed for in fixing rules, etc.
- 35.—Depreciation fund, how expended.
- 36.—Board to be informed new constructions, etc.
- 37.—Public Utility may divide its surplus profits.
- 38.—Board may make orders as to tolls, etc., payable Public Utility.
- 39.—Public Utility to furnish accounts, etc., for investigation purposes.
- 40.—Board may publish annual reports.
- 41.—Annual report also to include information useful to Public.
- 42.—Board to have general supervision.
- 43.—Every Public Utility to file schedules of rates, etc.
- 44.—Rules and regulations also to be filed.
- 45.—Certain portion of schedule to be printed in plain type and filed in office of Public Utility.
- 46.—Schedules when filed not changeable unless Board approves.
- 47.—New schedules to be filed in office of Public Utility.
- 48.—No Public Utility to take less for services than prescribed in schedules.
- 49.—Board may change form of schedules.
- 50.—Public Utility not to abandon lines without Board's consent.
- 51.—Board may make and amend rules, etc.
- 52.—Board commissioner or person authorized may inspect books, etc.
- 53.—Board may take evidence under oath and issue subpoena.
- 54.—Board not bound by any judgment of Court.
- 55.—Suit pending not to deprive Board of jurisdiction.
- 56.—Unless otherwise provided, costs in discretion of Board.
- 57.—Board's decision or order to be rule of Supreme Court and enforced in same way.

- 58.—Order rescinding or varying decision may also be made an order.
- 59.—Board's order need not show justification.
- 60.—Case stated.
- 61.—Court to determine case.
- 62.—Appeal from Board's decision.
- 63.—Procedure on appeal.
- 64.—Board, to be furnished with required information, maps, etc.
Fill out blanks.
- 65.—Upon complaint made Board's procedure and powers.
- 66.—Public Utility to be notified.
- 67.—Board to give ten days' notice.
- 68.—Notice, how given.
- 69.—Board's powers when rates, tolls, and schedules found unjust, etc.
- 70.—Board of its own motion may investigate.
- 71.—Board may order formal hearing.
- 72.—Notice of time and place to be given Public Utility.
- 73.—Public Utility may make complaint.
- 74.—Commissioner has power to administer oaths.
Procedure, where Board's order is disobeyed.
- 75.—Evidence to be taken as in Supreme Court.
- 76.—Record of proceedings of investigation to be kept.
- 77.—No franchise, etc., nor contract, etc., be assigned unless under authority of Statute or Board.
Proviso.
- 78.—All Public Utilities to confirm schedules to Board's order.
- 79.—Board may rescind, alter or amend its order as to rates, etc.
- 80.—Witness not excused from testifying because answer may incriminate him.
- 81.—Board to furnish certified copies of order.
- 82.—Public Utility not to issue shares, stocks without Board's approval.
Duty of Board.
- 83.—Director, etc., making false statements.
Penalty.
- 84.—Penalty, where Public Utility guilty of unjust discrimination.
- 85.—Public Utility not to take for services rendered.
Proviso.
- 86.—Penalty where Public Utility gives undue preference.
- 87.—Penalty for giving rebate, etc.
- 88.—Penalty where officer, etc., fails to fill out blanks, giving false answers, etc.
- 89.—Penalty, where not otherwise provided.
- 90.—Penalty for destroying, etc., Board's appliances.
- 91.—Each day's non-compliance with Board's order a separate offence.
- 92.—Board may inquire into Public Utility's neglect, etc., of regulations.
- 93.—Deputy-Attorney-General, Board's Counsel.
Salary.

94.—Act, how construed.

95.—Consent of Attorney-General necessary.

Time limit.

96.—Charter rights excluded, Board may recommend.

97.—Acts repealed. 4

Be it enacted by the Governor, Council, and Assembly, as follows:—

Title.

1. This Act may be cited as the 'Public Utilities Act.'

Interpretation.

2. In this Act, unless the context otherwise requires:—

- (a) the term 'Board' means the Board of Commissioners of Public Utilities;
- (b) the terms 'Public Utility' and 'Corporation' mean and include any corporation (other than a municipal corporation, except as hereinafter mentioned), company, person, association or persons, their lessees, trustees, liquidators or receivers that now or hereafter owns or may own, operate, manage or control, or may be incorporated for the purpose of owning, operating, managing or controlling any tramway for the conveyance of passengers, or any plant or equipment for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public, and also mean and include any city, incorporated town or municipality that now or hereafter owns or may own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public, and also mean and include any city, incorporated town or municipality that now or hereafter owns or may own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for any other city, incorporated town or municipality;
- (c) the term 'Commissioner' means a member of the Board;
- (d) 'net income or revenue,' means the money available for dividends and surplus, according to the accounts prescribed by the Board and required to be kept by every public utility;
- (e) the term 'Extension' includes any reasonable extension of the service and facilities of every public utility;
- (f) the term 'Tramway' includes street railroad, railway or tramway for the conveyance of passengers, including poles, wires or other appliances and equipment connected therewith of the class operated by motive power other than steam, and usually constructed in whole or in part in, under or above the public streets, roads, ways and places;
- (g) the term 'Telephone Line' includes conduits, ducts, poles, wires, cables, cross-arms, receivers, transmitters, instru-

ments, machines and appliances, and all devices, real estate, franchises, easements, apparatus, fixtures, property, appurtenances and routes, used, operated, controlled or owned by any public utility to facilitate the business of affording telephonic communication for hire.

3. The Governor-in-Council may appoint three persons who shall constitute a Board of Commissioners of Public Utilities, and shall designate a chairman and a vice-chairman thereof and appoint a clerk for such Board, who shall keep a full and faithful record of its proceedings and serve such notices and perform such duties as the Board may require. Such commissioners and clerk shall be sworn to the faithful performance of the duties of their respective offices before entering upon the discharge of same. Board, etc., how appointed.

4. No commissioner shall be directly or indirectly employed by or interested in any public utility or interested in any share, stock, bond, mortgage, security or contract of any such public utility; and if any such commissioner shall voluntarily become so interested his office shall become vacant; and if any such commissioner shall become so interested otherwise than voluntarily, he shall, within a reasonable time, divest himself of such interest, and if he fails so to do his office shall become vacant. Commissioner not to be interested in any public utility, etc.

5. If any commissioner is so interested in any matter before the Board, or if any commissioner shall be unable to act by reason of illness, absence or other cause, the Governor-in-Council may appoint some disinterested person to act as commissioner in his stead in and about such matter or until such disability comes to an end. Any person so appointed may complete any unfinished business in which he has taken part, even if the commissioner whom he has replaced has returned or has become able to act. Commissioner interested or absent.

6. No commissioner shall be disqualified by reason of being the lessee or user of a telephone or the purchaser of power, water or electric current or service from any public utility, from acting in any matter affecting such public utility. Commissioner when not disqualified.

7. The said commissioners and clerk shall be paid such salary and expenses as the Governor-in-Council determines. Salary and expenses.

8. Every public utility shall, on or before the first day of May in each year, pay to the Board a sum of twenty-five dollars, except that in the case of corporations solely engaged in the conveyance of telephone messages, and having in operation on the thirty-first day of December preceding such first day of May in each year not more than four hundred telephone stations, the following sums shall be paid in lieu of the sum of twenty-five dollars, namely:— Amount payable by Public Utility.

Over one hundred stations and under two hundred stations, ten dollars;

Two hundred stations and under three hundred stations, fifteen dollars;

Three hundred stations and not exceeding four hundred stations, twenty dollars.

Board's expenses to be borne by the Public Utilities.

9. The annual expenses of the Board, including the salaries of the commissioners, clerk and counsel, and the compensation to referees, experts, accountants, stenographers and typewriters, shall be borne by the several public utilities having gross earnings for the year preceding such assessment as shown by the annual report of such respective public utilities filed with the Board for such preceding year, to the amount of five thousand dollars. On or before the first day of July in each year the Board shall assess upon each of such public utilities its just proportion of such expenses in proportion to its gross earnings for the preceding year as shown by such annual reports filed with the Board.

Amount assessed when payable.

10. The amount so assessed shall be paid to the Board on or before the first day of August following such assessment by each such public utility, and in default of payment by any such public utility the Board may embody such assessment in an order of the Board which may be made a rule or order of the Supreme Court as provided in this Act. The provisions in the three sections next preceding shall be deemed to have come into force and to have been in effect as though the same had been contained in Chapter 64 of the Acts of 1912.

Payment by Governor-in-Council.

11. The Governor-in-Council is authorized to pay and advance annually out of the Provincial Treasury any sums, not exceeding four thousand dollars in all, for the payment of any portion of such annual expenses, salaries or compensation.

Advances, how repayable.

12. Any such advances or payments shall be made on such terms and be subject to such conditions as may be determined by the Governor-in-Council, and may be repayable out of any assessment made on the public utilities under this section.

Vice-Chairman, when to act.

13. In case of the absence of the chairman or his inability to act, the vice-chairman shall exercise the powers of the chairman, and in such case all regulations, orders and other documents signed by the vice-chairman shall have the same force and effect as if signed by the chairman.

Presumption as to Chairman.

14. Whenever the vice-chairman appears to have acted for or instead of the chairman, it shall be presumed that he so acted in the absence or disability of the chairman.

Quorum.

15. Two commissioners shall form a quorum and may exercise all the powers of the Board; provided that where there is no opposing party and no notice to be given to any interested party, any one commissioner may act alone for the Board.

Board may delegate commissioner to report.

16. The Board or chairman may authorize any one of the commissioners to inquire into and report to the Board upon any matter within the jurisdiction of the Board or pending before it, and when so authorized shall, for the purpose of taking evidence or obtaining information for such report, have all the powers of commissioners.

Vacancy not to affect Board.

17. No vacancy in the Board shall impair the right of the remaining commissioners to act.

18. Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. Public utility to furnish adequate service and facilities.

19. All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect to service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions. The taking of tolls, rates and charges contrary to the provisions of this section and the regulations made pursuant thereto is prohibited and declared unlawful. Equal tolls and rates, etc., to be charged.

20. Every public utility which furnishes telephone, heat, light or power service, and every telegraph company doing business within the Province, and having conduits, poles, wires or other equipment, shall, for a reasonable compensation, permit the use of the same by any other public utility furnishing any of said services whenever public convenience and necessity requires such use, and such use will not result in any substantial detriment to the service to be rendered. In case of failure to agree upon such use, or the conditions or compensation for such use, any public utility or any person or corporation interested may apply to the Board, and if after investigation the Board shall ascertain that public convenience and necessity require such use, and that it would not result in any substantial detriment to the service to be rendered by such owners or other users of such equipment, it shall by order direct that such use be permitted and prescribe conditions and compensation for such joint use. Such use so ordered shall be permitted, and such conditions and compensation so prescribed shall be the lawful conditions and compensation to be observed, followed and paid. Any such order of the Board may be from time to time revised by the Board upon application of any interested party or upon its own motion. Every public utility and telegraph company to permit under certain conditions, the use of its poles, etc.

21. The Board shall have power, after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of this Act, and any municipal ordinance or regulation relating to said public utility, and to conform to the duties upon it thereby imposed or by the provisions of its own charter, if any charter has or shall be granted it; provided, that nothing herein contained shall be held to relieve any public utility, its officers, agents or servants, from any punishment, fine, forfeiture or penalty, for violation of any such law, ordinance, regulation or duty imposed by its charter, nor to limit, take away or restrict the jurisdiction of any court or other authority which now has or which may hereafter have power to impose any such punishment, fine, forfeiture or penalty. Board can compel compliance with Act.

22. Whenever any public utility or person shall propose any change in any law relating, directly or indirectly, to the property or operations of any public utility, the said proposed change may be submitted to the Board, which may take evidence and give a public hearing thereon, and the Board may recommend such bills as will in its judgment protect the interests of the public and such public utility, and transmit the same to the Provincial Secretary. Proposed changes dealing with Public Utility to be submitted to Board.

Valuation by Board.

23. The Board may at any time with the assistance of such expert engineers, accountants, valuers and others as it deems wise to employ, inquire into the extent, condition and value of the physical assets of any public utility, or into the condition and value of the undertaking as a going concern; make such rules and regulations to facilitate inquiries to be made under this section as it may deem convenient, and the rules and regulations so made shall be binding upon all public utilities.

Board can require maps, reports, etc., to be furnished.

24. Every public utility shall furnish to the Board from time to time, and as the Board may require, maps, profiles, contracts, reports of engineers, and other documents, records and papers, or copies of any and all of the same in aid of such investigation, and to determine the value of the property of such public utility. And every public utility shall co-operate with the Board in the work of the valuation of its property in such further particulars and to such extent as the Board may direct. The Board shall, thereafter, in like manner, keep itself informed of all extensions and improvements or other changes in the condition of the property of the said public utilities, and ascertain the fair value thereof, and from time to time may revise and correct its valuation of the property of such public utilities. To enable the Board to make such changes and corrections in its valuation, every public utility shall report correctly to the Board changes in its property and to file with the Board copies of all contracts for changes and improvements at the time the same are executed.

Re-valuation can be made.

25. The Board may at any time make a revaluation of such property.

Public Utilities to keep account and returns as Board orders.

26. All public utilities shall keep such accounts, make such returns and otherwise render available to the Board all such information in respect to its business and affairs as the Board may from time to time order.

Board may prescribe form of books, etc., to be kept.

27. The Board may prescribe the forms of all books, accounts, papers and records required to be kept, and every public utility is required to keep and render its books, accounts, papers and records accurately and faithfully in the manner and form prescribed by the Board and to comply with all directions of the Board relating to such books, accounts, papers and records.

Blanks to be prepared and supplied.

28. The Board may cause to be prepared suitable blanks for carrying out the purposes of this Act, and shall when necessary furnish such blanks to each public utility.

Public Utility to have office in Province.

29. Each public utility shall have an office in one of the cities, towns or villages of the Province in which its property, or some part thereof, is located, and shall keep in said office all such books, accounts, papers or records as shall be required by the Board to be kept within the Province. No such books shall at any time be removed from the Province, except upon such conditions as may be prescribed by the Board.

Annual accounts to be kept, and balance sheet filed.

30. The accounts shall be closed annually on the last day of December in each year, and a balance sheet of that date shall be promptly taken therefrom. On or before the first day of February

following, such balance sheet, together with such other information as the Board shall prescribe, verified on oath by an officer of the public utility, shall be filed with the Board.

31. The Board may provide for the examination and audit of all accounts, and all items shall be allocated to the accounts in the manner prescribed by the Board. The agents, accountants or examiners employed by the Board shall have authority under the direction of the Board to inspect and examine all and any books, accounts, papers or records and memoranda kept by such public utilities.

Board may examine and audit accounts.

32. Every public utility shall carry a proper and adequate depreciation account whenever the Board, after investigation, shall determine that such depreciation account can be reasonably required. The Board shall ascertain and determine what are proper and adequate rates of depreciation of the several classes of property of each public utility. The rates shall be such as will provide the amounts required over and above the expense of maintenance to keep such property in a state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation account to such rates so ascertained and determined by the Board. The Board may make changes in such rates of depreciation from time to time as it may find necessary.

Depreciation account to be kept.

33. The Board may also prescribe rules, regulations and forms of accounts regarding such depreciation which the public utility is required to carry into effect.

Board may prescribe rules, etc., as to depreciation account.

34. The Board shall provide for such depreciation in fixing rates, tolls, and charges to be paid by the public.

Depreciation to be allowed for in fixing rules, etc.

35. All moneys provided under this Act for depreciation shall be set aside out of the earnings and carried in a depreciation fund. The moneys in this fund may be expended in new constructions, extensions or additions to property of such public utility, or invested, and, if invested, the income from the investments shall also be carried in the depreciation fund. This fund and the proceeds thereof shall be used for no other purpose than as provided in this section and for depreciation, unless with the consent or order of the Board.

Depreciation fund, how expended.

36. The Board shall keep itself informed of all new constructions, extensions and additions to the property of all public utilities and may prescribe the necessary forms, regulations and instructions to the officers and employees of public utilities for the keeping of construction accounts which shall clearly distinguish all operating expenses and new constructions.

Board to be informed new constructions, etc.

37. Nothing in this Act shall be taken to prohibit a public utility from entering into any reasonable arrangement with its employees for the division or distribution of its surplus profits. No such arrangement shall be lawful until it is found by the Board after investigation to be reasonable and just, and not inconsistent with the purposes of this Act. Such arrangement shall be under the supervision and regulation of the Board.

Public Utility may divide its surplus profits.

Board may make orders as to tolls, etc., payable Public Utility.

38. The Board may make from time to time such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders, or make new orders in substitution therefor.

Public Utility to furnish accounts, etc., for investigation purposes.

39. Each public utility shall furnish to the Board whenever required in connection with any investigation by the Board, in such form and at such times as the Board shall require, such accounts, reports and information as shall show in itemized detail: depreciation, salaries, wages; legal expenses, taxes and rentals; quantity and value of material used; receipts from residuals, by-products, services, or other sales; total and net costs; net and gross profits; dividends and interest; surplus or reserve; prices paid by consumers, and in addition such other items, whether of a similar nature to those hereinbefore enumerated or otherwise, as the Board may prescribe, in order to show completely and in detail the entire operation of the public utility in furnishing its product or service to the public.

Board may publish annual reports.

40. The Board may publish annual reports showing its proceedings and showing in tabular form the details as provided in the next preceding section for all the public utilities of each kind in the Province.

Annual report also to include information useful to public.

41. The Board may also publish in its annual report the value of all the property actually used and useful for the convenience of the public, and the value of the physical property actually used and useful for the convenience of the public of every public utility as to whose rates, charges, service or regulations any public hearing has been held by the Board under the provisions of this Act, or the value of whose property has been ascertained by it under the provisions of this Act.

Board to have general supervision.

42. The Board shall have the general supervision of all public utilities, and may make all necessary examinations and enquiries and keep itself informed as to the compliance by the said public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties.

Every Public Utility to file schedules of rates, etc.

43. Every public utility shall, on or before such date as is fixed by the Board, file with the Board schedules, which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by said public utility, and until such schedules have been filed the rates, tolls and charges shall not exceed those charged on the date of the coming into force of this Act and shall be and remain in force and be the lawful rates, tolls and charges until set aside or changed under and in conformity with the provisions of this Act.

Rules and regulations also to be filed.

44. Every public utility shall file with and as part of such schedule all rules and regulations that in any manner affect the rates charged or to be charged for any service.

45. That a copy of so much of said schedule as the Board shall deem necessary for the use of the public shall be printed in plain type and kept on file in every office of such public utility where payments are made by the consumers or users open to the public in such form and place as to be readily accessible to the public and so as to be conveniently inspected.

Certain portion of Schedule to be printed in plain type and filed in office of Public Utility.

46. No change shall, after the filing of said schedules, be made in any of the rates, tolls or charges, except upon thirty days' notice to and with the approval of the Board, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof thirty days prior to the time the same are to take effect; provided, that the Board upon application of any public utility may prescribe a less time within which a reduction may be made or within which additions may be made to such schedules in respect to service for which no rates, tolls or charges are thereby provided.

Schedules, when filed not changeable unless Board approves.

47. The copies of all new schedules shall be filed as hereinafter provided in every office of such public utility where payments are made by consumers or users thirty days prior to the time the same are to take effect unless the Board shall prescribe a less time.

New Schedules to be filed in office of Public Utility.

48. No public utility shall charge, demand, collect or receive a greater or less compensation for any service performed by it than is prescribed in such schedules as are at the time in force, or demand, collect or receive any rates, tolls or charges not specified in such schedules. The rates, tolls and charges named in the schedules, so filed and approved as aforesaid, shall be the lawful rates, tolls and charges until the same are altered, reduced or modified as provided in this Act.

No Public Utility to take less for services than prescribed in schedules.

49. The Board may prescribe such changes in the form in which the schedules are issued by any public utility as may be expedient.

Board may change form of schedules.

50. No public utility shall abandon any part of its line or lines, or works, after the same has been operated, without notice to the Board, and without the consent in writing of the Board, which consent shall only be given after notice to the city, town or municipality interested, and after due inquiry had.

Public Utility not to abandon lines without Board's consent.

51. The Board may, from time to time, make, revoke and alter rules and regulations for the effectual execution of its duties and of the intention and objects of this Act, and the regulation of the practice and procedure with regard to the matters over which it has jurisdiction; such rules and regulations, when approved by the Governor-in-Council, shall have the force of law.

Board may make and amend rules, etc.

52. The Board or any commissioner, or any person or persons employed by the Board for that purpose, shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any public utility, and the Board or any such commissioner shall have the power to examine, under oath, any officer, agent or employee of such public utility in relation to its business and affairs. Any person other than one of such commissioners who shall make

Board, commissioner or person authorized may inspect books, etc.

59. It shall not be necessary that any order of the Board shall show upon its face that any proceeding or notice was had or given, or any circumstances existed necessary to give it jurisdiction to make such order. Board's order need not show justification.

60. The Board may of its own motion or upon the application of any party, and upon such security being given as the Board directs, state a case in writing for the opinion of the Supreme Court *in banco* upon any question which in the opinion of the Board is a question of law. A like reference may also be made at the request of the Governor-in-Council. Case stated.

61. The Supreme Court shall hear and determine the question or questions of law arising thereon and remit the matter to the Board, with the opinion of the Court thereon. Court to determine case.

62. An appeal shall lie to the Supreme Court *in banco* from any final decision of the Board upon any question as to its jurisdiction or upon any question of law, but such appeal can be taken only by permission of a judge of the said court, given upon a petition presented to him within fifteen days after the rendering of the decision, and upon such terms as said judge may determine. Notice of such petition shall be given to the parties or their solicitor and to the Board, at least two clear days before the presentation of such petition. Appeal from Board's decision.

63. When the petition for appeal has been granted, the appeal shall be brought by notice served on the chairman or vice-chairman of the Board within ten days after the permission to appeal has been granted. The notice shall contain the names of the parties and the date of the order appealed from. After such notice has been filed and within such ten days, a copy of such notice shall be served upon the adverse party by the party appealing. Procedure on appeal.

64. Every public utility shall furnish to the Board all information required by it to carry into effect the provisions of this Act, and shall make specific answers to all specific questions submitted by the Board. Any public utility receiving from the Board any blanks with directions to fill the same shall cause the same to be properly filled out so as to answer, fully and correctly, each question therein propounded, and in case it is unable to answer any question it shall give a good and sufficient reason for such failure; and such answer shall be verified under oath by the President, Secretary, Superintendent or General Manager of such public utility, and returned to the Board at its office within the period fixed by the Board. Whenever required by the Board, every public utility shall deliver to the Board any and all maps, profiles, contracts, reports of engineers, and all documents, books, accounts, papers and records, or copies of any or all of the same, with a complete inventory of all its property, in such form as the Board may direct. Board to be furnished with required information, maps, etc. Fill out blanks.

65. Upon a complaint made to the Board against any public utility by any municipal corporation or by any five persons, firms or corporations, that any of the rates, tolls, charges or schedules are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurements, practice or act whatsoever affecting or Upon complaint made Board's procedure and powers.

relating to the operation of any tramway or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveyance of telephone messages, or any service in connection therewith, is in any respect unreasonable, insufficient or unjustly discriminatory or that the service is inadequate or unobtainable, the Board shall proceed, with or without notice, to make such investigation as it deems necessary or expedient, and may order such rates, tolls, charges or schedules reduced, modified or altered, and may make such other order as to the modification or change of such regulation, measurements, practice or acts as the justice of the case may require, and may order on such terms and subject to such conditions as are just that the public utility furnish reasonably adequate service and facilities and make such extensions as may be required, but no such order shall be made or entered by the Board without a public hearing or inquiry first had in respect thereto. The Board, when called upon to institute an investigation, may, in its discretion, require from the complainants the deposit of a reasonable amount of money or other security to cover the costs of the investigation, which money or security shall be dealt with as the Board directs, should the decision be given against the complainants.

Public Utility
to be notified.

66. The Board shall prior to such formal hearing notify the public utility complained of that a complaint has been made, and ten days after such notice has been given the Board may proceed to set a time and place for a hearing and an investigation as herein-after provided.

Board to give ten
days notice.

67. The Board shall give the public utility and the complainant, if any, ten days' notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined. Both the public utility and complainant shall be entitled to be heard and shall have process to enforce the attendance of witness.

Notice, how
given.

68. Notice of the hearing of any application for the approval of or providing for an increase or decrease in the charges taken or collected by any public utility, unless otherwise ordered by the Board, shall be given by advertisement in one or more newspapers published in the city, town or municipality where such changes of rates or charges is sought, for a period of not less than twenty days. If no newspaper is published in such city, town or municipality, said notice shall be published in a newspaper which circulates therein.

Board's powers
when rates,
tolls, and
schedules found
unjust, etc.

69. If upon such investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this Act, the Board shall have power to determine and by order fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable. If upon such investigation it shall be found that any regulation, time schedule, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this Act, or if it is found that reasonable service is not supplied, the Board shall have power to determine and substitute therefor such other regulations, time schedules, service or acts, and to make such order respecting and

such changes in such regulations, time schedules, service or acts as shall be just and reasonable. And upon any investigation for the purpose of determining upon and requiring any reasonable extension or extensions of lines or of service that shall promise to be compensatory within a reasonable time, the Board shall have power to fix, determine and require every such extension or extensions to be made and the terms and conditions upon which the same shall be made; provided, that no hearing shall be had and no order shall be made respecting such extension or extensions without notice to the public utility affected thereby, as provided in this Act.

70. Whenever the Board shall believe that any rate or charge is unreasonable or unjustly discriminatory, or that any reasonable service is not supplied or that an investigation of any matter relating to any public utility should for any reason be made, it may, on its own motion, summarily investigate the same with or without notice. Board of its own motion may investigate.

71. If after making such investigation the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement, notifying the public utility of the matters under investigation. Ten days after such notice has been given the Board may proceed to set a time and place for a hearing and an investigation as hereinbefore provided. Board may order formal hearing.

72. Notice of the time and place for such hearing shall be given to the public utility and to such other interested persons as the Board shall deem necessary, as provided in this Act, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the Board relative to the matter investigated, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint. Notice of time and place to be given Public Utility.

73. Any public utility may make complaint as to any matter affecting its own product or service with like effect as though made by a municipal corporation as provided in this Act. Public Utility may make complaint.

74. Every commissioner for the purposes mentioned in this Act, shall have power to administer oaths, certify to official acts, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony. In case of disobedience on the part of any person or persons to comply with any order of the Board or any commissioner, or any subpoena, or on the refusal of any witness to testify to any matter regarding which he may be interrogated before the Board or any commissioner, it shall be the duty of the Supreme Court, or a judge thereof, on application of the Board or a commissioner, to compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein. Commissioner has power to administer oaths. Procedure where Board's order is disobeyed.

75. The Board may, in any investigation, cause the evidence of witnesses residing within or without the Province to be taken in the manner prescribed by law for like depositions in civil actions in the Supreme Court. Evidence to be taken as in Supreme Court.

Record of proceedings of investigation to be kept.

76. A full and complete record shall be kept of all proceedings had before the Board on any formal investigation had, and all testimony shall be taken down by a stenographer appointed by the Board if so ordered by the Board.

No franchise, etc., no contract, etc., be assigned unless under authority of Statute or Board Proviso.

77. No franchise nor any right under any franchise to own or operate any public utility, or to use the tracks of any tramway, shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting any such franchise or right be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement has been made under the authority of a statute, or with the written approval of the Board. The approval of the Board of any such assignment, transfer, lease, contract or agreement under this section shall not be held or construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture.

All Public Utilities to conform Board's order.

78. All public utilities to which an order of the Board applies shall make such changes in their schedules on file as may be necessary to make the same conform to such order, and no change shall thereafter be made by any public utility in any such rates, tolls or charges, without the approval of the Board. Certified copies of all orders of the Board shall be delivered to the public utility affected thereby, and the same shall take effect within such reasonable time thereafter as the Board shall prescribe. The Board may in and by any order as to rates, tolls, charges or schedules prescribe a specified term during which such rates, tolls, charges or schedules shall remain in force.

Board may rescind, alter or amend its order as to rates, etc.

79. The Board may, at any time, upon notice to the public utility and after hearing as provided in this Act, rescind, alter or amend any order fixing any rate or rates, tolls, charges or schedules, or any other order made by the Board, and certified copies of the same shall be served and take effect as herein provided for original orders.

Witness not excused from testifying because answer may incriminate him.

80. No person shall be excused from testifying or from producing books, accounts and papers in any proceeding based upon or growing out of any violation of the provisions of this Act, on the ground or for the reason that the evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may have testified or produced any documentary evidence.

Board to furnish certified copies of order.

81. Upon application of any person the Board shall furnish certified copies, under the seal of the Board, of any order made by it, which shall be *prima facie* evidence of the facts stated therein.

Public Utility not to issue shares, stocks, without Board's approval.

82. No public utility shall hereafter issue any shares, stocks, bonds, debentures or any evidence of indebtedness payable in more than one year from the date thereof, until it has first obtained authority from the Board for such proposed issue. It shall be the duty of the Board, after hearing, to approve of any such proposed issue when satisfied that the same is to be made in accordance with

law, and the purpose and amount of such issue is approved by the Board. No public utility incorporated under The Nova Scotia Companies' Act shall increase its capital under section 24, of the said Act without the approval of the Board, but any public utility, whether incorporated under the said Act or by statute, may, from time to time, with the approval of the Board, increase its capital to an amount not exceeding the capital authorized by the Legislature, but not beyond the amount authorized by its Memorandum of Association, as the case may be, but such increase shall only be made in the case of a public utility incorporated by statute by the resolution of a majority in interest of its shareholders passed at a special general meeting duly called for the purpose.

83. Every director, president, secretary or other official of any such public utility who makes any false statements to secure the issue of any share, stock, certificate of stock, bond, mortgage or other evidence of indebtedness, or who shall, by false statement knowingly made, procure of the Board the making of the certificate herein provided, or with knowledge of such fraud, issue, negotiate or cause to be negotiated, any such share, stock, certificate of stock, bond, mortgage or other evidence of indebtedness in violation of this Act, shall be liable to a penalty of not less than five hundred dollars, or to imprisonment for a term of not less than one year, or to both such penalty and imprisonment, in the discretion of the Court.

Director, etc.,
making false
statements.
Penalty.

84. If any public utility or any agent or officer thereof shall directly or indirectly, by any device whatsoever, or otherwise, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than that prescribed in the public schedules or tariffs then in force or established as provided in this Act, or than it charges, demands, collects or receives from any other person, firm, or corporation other than one conducting a like business for a like and contemporaneous service, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful, and upon conviction thereof shall be liable to a penalty of not less than fifty dollars for each offence; and such agent or officer so offending shall upon conviction thereof be liable to a penalty of not less than twenty-five dollars for each offence.

Penalty when
Public Utility
guilty of unjust
discrimination.

85. It shall be unlawful for any public utility to demand, charge, collect or receive from any person, firm or corporation less compensation for any service rendered or to be rendered by said public utility in consideration of the furnishing by said person, firm or corporation of any part of the facilities incident thereto; provided, that nothing herein shall be construed as prohibiting any public utility from renting any facilities incident to the operation of a tramway or to the production, transmission, delivery or furnishing of heat, light, water or power or the conveyance of telephone messages, and paying a reasonable rental therefor; or as requiring any public utility to furnish any part of such appliances which are situated in and upon the premises of any consumer or user, except telephone station equipment upon the subscriber's premises, and unless otherwise ordered by the Board, meters and appliances for measurements of any product or service.

Public Utility
not to take for
services
rendered.
Proviso.

Penalty when
Public Utility
gives undue
preference.

86. If any public utility shall knowingly or wilfully make or give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or shall subject any particular person, firm or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful. Any person, firm or corporation violating the provisions of this section shall on conviction thereof be liable to a penalty of not less than fifty dollars for each offence.

Penalty for
giving rebate,
etc.

87. It shall be unlawful for any person, firm or corporation knowingly to solicit, accept or receive any rebate, concession or discrimination in respect to any service in or affecting or relating to any public utility, or for any service in connection therewith, whereby any such service shall, by any device whatsoever or otherwise, be rendered free or at a less rate than that named in the schedules and tariffs in force as provided in this Act, or whereby any service or advantage is received other than is in this Act specified. Any person, firm or corporation violating the provisions of this section shall on conviction thereof be liable to a penalty of not less than twenty-five dollars for each offence.

Penalty where
officer, etc.,
fails to fill out
blanks, giving
false answers,
etc.

88. Any officer, agent or employee of any public utility who shall fail or refuse to fill out and return any blanks, as required by this Act, or shall fail or refuse to answer any question therein asked, or shall wilfully give a false answer to any such question, or shall evade the answer to any such question where he has the means of ascertaining the fact inquired of, or who shall, upon proper demand, fail or refuse to exhibit to the Board or any commissioner, or any person authorized to examine the same, any book, paper, account, record or memoranda of such public utility which is in his possession or under his control, or who shall fail to properly use and keep his system of accounting, or any part thereof, as prescribed by the Board under this Act, or who shall refuse to do any act or thing in connection with such system of accounting when so directed by the Board or its authorized representative, shall, upon conviction thereof, be liable to a penalty of not less than two hundred dollars for each offence, and a penalty of not less than five hundred dollars shall, on conviction, be imposed on the public utility for each such offence when such officer, agent or employee acted in obedience to the direction, instruction or request of such public utility or any general officer thereof.

Penalty where,
not otherwise
provided.

89. If any public utility shall violate any provision of this Act, or shall do any act by this Act prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement or order made by the Board, or any judgment or decree made by any court upon its application, for every such violation, failure or refusal such public utility shall be liable to a penalty of two hundred dollars for each such offence. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any public utility acting within the scope of his employment and instructions shall in every case be deemed to be the act, omission or failure of each public utility.

90. Any person who shall destroy, injure or interfere with any apparatus or appliance owned or operated by or in charge of the Board or its agent shall, upon conviction, be liable to a penalty not exceeding one hundred dollars or imprisonment for a period not exceeding thirty days, or both.

Penalty for destroying, etc., Board's appliances.

91. Every day during which any public utility, or any officer, agent or employee thereof, shall fail knowingly or wilfully to observe and comply with any order or direction of the Board, or to perform any duty enjoined by this Act, shall constitute a separate and distinct violation of such order or direction, or of this Act, as the case may be.

Each day's non-compliance with Board's order a separate offence.

92. The Board may inquire into any neglect or violation of the laws or regulations in force in the Province by any public utility doing business therein, or by the officers, agents or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and it shall be its duty, to enforce the provisions of this Act as well as all other laws relating to public utilities.

Board may inquire into Public Utility's neglect, etc., of regulations.

93. The Deputy Attorney-General of the Province shall be the counsel of the Board and shall be paid in addition to his compensation otherwise provided by law such annual salary as the Board may determine, which shall form part of the annual expenses of the Board. It shall be the duty of the counsel to represent and appear for the Board in all actions and proceedings involving any question under this Act, or under, or in reference to any act, order or proceeding of the Board, and if directed to do so by the Board, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute all actions and proceedings directed or authorized by the Board, and to expedite, in every way possible, final and just determination of all such actions and proceedings; to advise the Board and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the Board and of the members thereof, and generally to perform all duties and services as solicitor and counsel to the Board which the Board may reasonably require of him.

Deputy-Attorney-General Board's Counsel. Salary.

94. The provisions of this Act shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Board, by the provisions of this Act, the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this Act conferred on the Board. The Board hereby created shall have, in addition to the powers in this Act specified, mentioned and indicated, all additional, implied and incidental powers which may be proper or necessary to carry out, effect, perform and execute all the said powers herein specified, mentioned and indicated. A substantial compliance with the requirements of this Act shall be sufficient to give effect to all the rules, orders, acts and regulations of the Board, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.

Act, how construed.

95. No action or prosecution for any penalty for a violation of any of the provisions of this Act shall be commenced without the consent of the Attorney-General, nor after the expiration of one year from the time of the commission of the alleged offence.

Consent of Attorney-General necessary. Time limit.

Charter rights
excluded.
Board may
recommend.

96. Subject to the provisions of section 82 of this Act, the powers, rights, privileges and obligations secured to or imposed upon any public utility by any statute, or by any contract or agreement made under the authority of any statute, shall not be subject to the provisions of this Act, and nothing in this Act contained shall authorize, the Board to alter, enlarge or diminish such rights, powers, privileges and obligations, or to impair the obligation of any contract, but the Board may at any time inquire into any such rights, powers, privileges or obligations in so far as the exercise or observance thereof affects the public interest, and may make such recommendations to the Legislature in connection therewith as may be deemed just and right.

Acts repealed.

97. The Acts and parts of Acts referred to in the schedule hereto are repealed to the extent in such schedule stated.

SCHEDULE.

<i>Acts Repealed.</i>	<i>Extent of Repeal.</i>
Acts of 1909, Chapter 1	The Whole Act.
Acts of 1910, Chapter 17	Sections 27 and 28.
Acts of 1911, Chapter 14	Sections 15 and 16.
Acts of 1912, Chapter 64	The Whole Act.

APPENDIX D.

PROVINCE OF MANITOBA.

STATUTES OF 1912, CHAPTER 66.

An Act respecting Public Utilities, to create a Public Utility Commission and to prescribe its Powers and Duties.

[Assented to April 6th, 1912.]

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:—

Short title.

1. This Act may be cited as 'The Public Utilities Act.'

Interpretation.

2. In this Act, unless the context otherwise requires:—

"Commission."
"Commissioner."

(a) The word 'Commission' or 'Commissioner' means the Public Utility Commissioner appointed under this Act;

"Public Utility."

(b) The words 'public utility' mean and include every corporation other than a municipal corporation (unless such municipal corporation voluntarily comes under this Act in the manner hereinafter provided) and every firm, person or association of persons, the business and operations whereof are subject to the legislative authority of this Province, their lessees, trustees, liquidators or receivers

appointed by any court, that now or hereafter own, operate, manage or control any system, works, plant or equipment for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway, street railway or tramway, or for the production, transmission, delivery or furnishing of water, gas, heat, light or power, either directly or indirectly to or for the public, also the Manitoba Government Telephones now managed and operated by the Government Telephone Commissioners, and the system and business of grain elevators managed and controlled by the commissioners appointed under 'The Manitoba Grain Elevators Act';

(c) The word 'charter' means any special or general legislative "Charter." Act by or in virtue of which a corporation or company is incorporated and the letters patent issued in virtue of such general Act.

3. This Act shall apply to all public utilities as hereinbefore defined, which are now or may hereafter be owned or operated by or under the control of the Government of the Province and to all such public utilities that shall be owned or operated by or under the control of any company or corporation hereafter created or incorporated or created or incorporated at the present session of the said Legislature, but shall not apply to any public utility owned or operated by any previously existing company or corporation or which public utility is continued in the name of another company unless and until the same is brought under this Act by an order of the Lieutenant-Governor-in-Council, which may be made upon and after the due passing of a by-law by the council of any municipality in which the operations of such public utility are carried on, requesting that all public utilities operated within the municipality, in so far as such operation is within the municipality, including those owned or operated by the municipality itself, be made subject to this Act. Application of Act.

4. The Lieutenant-Governor-in-Council may appoint a Commissioner, to be called 'The Public Utility Commissioner.' The Commissioner shall constitute a court, which shall be a court of record and shall have a seal of his office, bearing the words 'Public Utility Commissioner.' Appointment of Commissioner.

5. The Commissioner shall hold office during good behaviour, but may be removed at any time by the Lieutenant-Governor-in-Council for cause. The Commissioner shall devote the whole of his time to the performance of his duties under this Act, and shall not accept or hold any office or employment inconsistent with this section. Term of office.
To devote whole time to duties.

6. If, in the opinion of the Lieutenant-Governor-in-Council, the Commissioner is interested in any matter before him, or if the Commissioner is unable to act by reason of sickness, absence or other cause, the Lieutenant-Governor-in-Council may appoint some disinterested person to act as Commissioner in his stead, in and about such matter, or until such disability comes to an end; and any person so appointed may complete any unfinished business in which he has taken part, even if the Commissioner whom he had replaced has returned or has become able to act. Appointment of Acting Commissioner.

7. The Commissioner shall not hold any office or carry on any employment inconsistent with the performance of his duties, nor shall he, directly or indirectly— Commissioner not to hold other offices

or be interested in anything public utility.

(a) Hold, acquire or become interested in, for his own behalf, any stock, share, bond, debenture or other security of any public utility;

or have interest in anything used by public utility.

(b) Have an interest in any device, appliance, machine, patented process or article, or in any part thereof, which may be used for the purposes of the business of a public utility. If any such thing, or any interest therein, is the property of the Commissioner when he is appointed to his office, or if thereafter, and while he holds such office, he acquires the same by succession or by will, he shall, within six months after such appointment or subsequent acquisition, as the case may be, alienate the same or his interest therein.

Commissioner to dispose of such interests.

Where Commissioner shall reside.

8. The Commissioner shall, during his term of office, reside in such place as the Lieutenant-Governor-in-Council, from time to time, determines.

Where Commission shall sit.

9. The Lieutenant-Governor-in-Council shall fix the place where the Commission shall sit and shall have its office, and shall also provide it with suitable quarters, furniture and facilities for the holding of its sittings and the transaction of its business generally.

Under special circumstances Commission may sit elsewhere.

10. Whenever circumstances render it expedient to hold a sitting of the Commission elsewhere than in the place fixed by the Lieutenant-Governor-in-Council, the Commission may hold such sitting in any part of the Province.

Appointment of experts to assist Commissioner.

11. The Lieutenant-Governor-in-Council may, upon the recommendation of the Commissioner, from time to time appoint one or more experts, or persons having technical or special knowledge of the matter in question, to inquire into and report to the Commissioner and to assist the Commissioner in an advisory capacity in respect of any matter before him.

Appointment of secretary.

12. There shall be a secretary of the Commission, who shall be appointed by the Lieutenant-Governor-in-Council, and who shall hold office during his pleasure.

Duties of secretary.

13. (1) It shall be the duty of the secretary:—

Attend sittings.

(a) To attend all sessions of the Commission;

Keep record.

(b) To keep a record of all proceedings conducted before the Commission;

Have custody of records.

(c) To have the custody and care of all records and documents of the Commission;

Obey rules and directions.

(d) To obey all rules of practice and directions which may be made or given by the Commission touching his duties or office;

To have rules of practice signed and sealed.

(e) To have every order and rule of practice of the Commission drawn pursuant to the direction of the Commission, signed by the Commissioner, sealed with the official seal of the Commission, and filed in the office of the secretary.

To keep copies of rules and documents.

(2) The secretary shall keep suitable books of record, in which he shall enter a true copy of every such order and rule of practice,

and every other document which the Commission shall order to be entered therein, and such entry shall constitute and be the original record of any such order or rule of practice.

(3) Upon application of any person, and on payment of such fees as the Lieutenant-Governor-in-Council may prescribe, the secretary shall deliver to such applicant a certified copy of any such order, rule of practice or other document.

To give copies of orders, etc.

14. In the absence of the secretary, the Commission may replace him temporarily. Acting secretary.

15. Neither the Commissioner, nor the secretary of the Commission, nor any employee under its control, shall be personally liable for anything done by it or by him under the authority of this Act.

Commissioner and officers not personally liable for acts of Commission.

16. The Commissioner, secretary and other officials or appointees of the Commission shall receive such remuneration as may be fixed by the Lieutenant-Governor-in-Council.

Remuneration of Commissioner and officials.

17. Whenever the Commissioner, acting within his jurisdiction, appoints or directs any person, other than a member of his staff, to perform any service required by this Act, such person shall be paid therefor such sum for services and expenses as the Lieutenant-Governor-in-Council may, upon the recommendation of the Commissioner, determine.

Remuneration of special employees.

18. The above remuneration, and all the expenses incurred by the Commission in the performance of its duties, including all reasonable travelling expenses of the Commissioner and secretary, and of such members of the staff of the Commission as may be required by the Commission, shall be paid monthly, out of the Consolidated Revenue Fund of the Province.

Remuneration to be paid out of consolidated revenue.

19. The Commission shall have jurisdiction:—

Jurisdiction of Commission.

(a) In all matters within the jurisdiction of the Railway Commissioner appointed under 'The Railway Commissioners Act,' for which Railway Commissioner the said Commission is hereby substituted, and with whose powers it is hereby vested; and any engineer or other officer appointed by the Commission for any purposes prescribed by the said Act or 'The Manitoba Railway Act' shall possess the same powers and be subject to the same obligations as any engineer or officer mentioned in the said Acts, and performing like duties, possesses or is subject to;

Under "Railway Commissioners" and "Railway" Act.

(b) In all questions relating to the transportation of goods or passengers on the lines of any tramway company or street railway company or steam railway company under the jurisdiction of the Legislature of Manitoba as herein defined or on any parts thereof; and for such purpose it may authorize or require any such company to carry goods or passengers on its lines or any part thereof for any period of time and at such prices as it may fix;

Respecting railways.

(c) Whenever it is made to appear to the Commission, upon the complaint of any public utility, or of any person or persons having an interest, present or contingent, in the matter respecting which

Adjusting rates and charges where same are

excessive or
discriminating.

the complaint is made, that there is reason to believe that the tolls demanded by any public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, and in such case it may proceed to hold such investigation as it sees fit into all matters relating to the nature and quality of the service or the commodity in question, or to the performance of such service and the tolls or charges demanded therefor, and may make such order respecting the improvement of the commodities or services and as to the tolls or charges demanded, as seems to it to be just and reasonable, and may disallow or change, as it thinks reasonable, any such tolls or charges as, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities: the whole, however, subject to such of the provisions of any contract existing between such public utility and a municipality at the time such complaint is made as the Commissioner shall consider fair and reasonable;

Adjusting disputes between public utilities and municipalities as to use of streets, etc.

(d) In all cases arising when a public utility having the right to enter a municipality for the purpose of placing therein, with or without the consent of the municipality, its rails, posts, wires, pipes, conduits or other appliances, upon, along, across, over or under any public road, street, square, water-course or part thereof, cannot come to any agreement with such municipality, as to the use, as aforesaid, of the roadway or of the water-course in question, or as to the terms and conditions of such use, and applies to the Commission for permission to use such roadway or water-course, or to fix the terms and conditions of such use; and in such case the Commission may permit, as aforesaid, the use of such roadway or water-course, and prescribe the terms and conditions thereof;

Permitting public utility to cross territory without consent of municipality in order to reach territory where it may lawfully do business.

(e) In all questions arising whenever a public utility, being unable to extend its system, line or apparatus from a point where it lawfully does business to another point or points where it is authorized to do business, without placing its rails, posts, wires, pipes, conduits or other apparatus upon, along, across, over or under some public road, street, square, water-course or part thereof, which it cannot lawfully so use without the consent of the municipal corporation having control of the same, and being unable to come to an agreement with the said municipal corporation, applies to the Commission for permission to use such public road, street, square or water-course or part thereof; and, for the purpose of such extension only, and without unduly preventing the use thereof by other persons or companies already lawfully using the same, the Commission may permit such use, notwithstanding any law or contract granting any other person or corporation exclusive rights with respect thereto, but shall prescribe the terms and conditions upon which such public utility may use such road, street, square or water-course, or part thereof;

Settling disputes between public utility and municipality as to terms and conditions.

(f) In all contestations arising between a public utility and a municipality with reference to the performance of the terms and conditions mentioned in paragraphs (d) and (e) of this section; and the Commission may change such terms and conditions if, in its opinion, such changes are necessary or desirable;

Respecting extensions of

(g) Upon the complaint of any municipality that a public utility doing business in such municipality fails to extend its services to

any part of such municipality, and after hearing the parties and service of their witnesses, and making such inquiry into such matter as it public utility. sees fit, may order the extension of such service and the conditions under which the same shall be done, including the cost of all necessary works, which it may apportion between the public utility and the municipality in any manner it deems equitable.

20. The Commission shall also have power:—

(a) To investigate, upon its own initiative or upon complaint Investigating in writing, any matter concerning any public utility as herein complaints. defined;

(b) From time to time to appraise and value the property of Appraising any public utility as herein defined, whenever in the judgment of value of the said Commissioner it shall be necessary so to do, for the purpose of carrying out any of the provisions of this Act, and in property of making such valuation the Commissioner may have access to and public utility. use any books, documents or records in the possession of any Department or board of the Province or any municipality thereof;

(c) After hearing, upon notice, by order in writing, to fix just Fixing fair and reasonable individual rates, joint rates, tolls, charges or rates to replace schedules thereof, as well as commutation, mileage and other unfair. special rates which shall be imposed, observed and followed thereafter by any public utility as herein defined, whenever the Commissioner shall determine any existing individual rate, joint rate, toll, charge or schedule thereof or commutation, mileage or other special rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential;

(d) To require every public utility as herein defined to file with Requiring the it complete schedules of every classification employed and of every filing of tariffs. individual or joint rate, toll, fare or charge made, charged or enacted by it for any product supplied or service rendered within this Province as specified in such requirement;

(e) After hearing, upon notice, by order in writing, to fix just Fixing classifica- and reasonable standards, classifications, regulations, practices, tions. measurements or service to be furnished, imposed, observed and followed thereafter by any public utility as herein defined;

(f) After hearing, upon notice, by order in writing to direct any Compelling railroad or street railway company to establish and maintain at any railway com- junction or point of connection or intersection with any other line panies to make of said road, or with any line of any other railroad, street railway connections with or traction company, such just and reasonable connections as shall other lines be necessary to promote the convenience of shippers of property, or and with private of passengers, and in like manner to direct any railroad, street rail- tracks. way or traction company engaged in carrying merchandise to construct maintain and operate, upon reasonable terms, a switch connection with any private side-track, which may be constructed by any shipper to connect with the railroad or street railway where, in the judgment of the Commissioner, such connection is reasonable and practicable and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same;

Commissioner
not to raise rates
beyond what
public utility
wishes to impose.

(g) In considering and acting upon any application or matter before the Commission involving the question of rates to be charged for service by any public utility, the Commissioner shall not make any ruling or direction to raise rates for any such service beyond what the owners of any such public utility may desire to impose.

Commission
may require
public utility

21. The Commission shall have power, after hearing, upon notice, by order in writing, to require every public utility as herein defined:—

to comply with
laws of Province;

(a) To comply with the laws of this Province and any municipal ordinance relating thereto, and to conform to the duties imposed upon it thereby or by the provisions of its own charter;

to furnish proper
service;

(b) To furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so;

to make
extensions;

(c) To establish, construct, maintain and operate any reasonable extension of its existing facilities where, in the judgment of said Commissioner, such extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same, and when the financial condition of the said public utility reasonably warrants the original expenditure required in making and operating such extension;

to keep books
and records in
uniform system;

(d) To keep its books, records and accounts so as to afford an intelligent understanding of the conduct of its business, and to that end to require every such public utility of the same class to adopt a uniform system of accounting, which system may be prescribed by the Commission;

to make reports
to Commission;

(e) To furnish annually a detailed report of finances and operations, in such form and containing such matters as the Commission may from time to time by order prescribe;

to carry deprecia-
tion account.

(f) To carry, whenever in the judgment of the Commissioner it may reasonably be required, for the protection of stockholders, bondholders or creditors, a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the Commission may prescribe. The Commission shall from time to time ascertain and determine, and by order in writing after hearing, fix proper and adequate rates of depreciation of the property of each public utility, in accordance with such regulations or classifications, which rates shall be sufficient to provide the amounts required over and above the expense of maintenance to keep such property in a state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed, and shall set aside the moneys so provided for out of earnings and carry the same in a depreciation fund. The income from investments of moneys in such fund shall likewise be carried in such fund. This fund shall not be expended otherwise than for depreciation, improvements, new constructions, extensions or additions to the property of such public utility;

Commission may
fix rate of de-
preciation.

Management
of depreciation
fund.

Commission may
require public
utility to give

(g) To give such notice to the Commission as the Commissioner may by order require of any and all accidents which may occur within this Province upon the property of any public utility as

herein defined or directly or indirectly arising from or connected with its maintenance or operation, and to investigate any such accident, and the Commissioner may make such order or recommendation with respect thereto as in his judgment may be just and reasonable.

notice of all accidents.

22. No change in any existing individual rates, joint rates, tolls, charges or schedules thereof or any commutation, mileage or other special rates shall be made by any public utility as herein defined, nor shall any new schedule of any such rates, tolls or charges be established until such changed rates or new rates are approved by the Commission, when they shall come into force on a date to be fixed by the Commission, and the Commission shall have power, either upon written complaint or upon its own initiative, to hear and determine whether the proposed increases, changes or alterations are just and reasonable. The burden of proof to show that any such increases, changes or alterations are just and reasonable shall be upon the public utility seeking to make the same.

No change to be made in rates or schedules without approval of Commission.

23. No public utility as herein defined shall:—

(a) Make, impose or exact any unjust or unreasonable, unjustly, discriminatory or unduly preferential individual or joint rate, commutation rate, mileage or other special rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within this Province;

Public utility shall not make unjust or discriminatory rates;

(b) Adopt or impose unjust or unreasonable classification in the making or as the basis of any individual or joint rate, toll, fare, charge or schedule for any product or service rendered by it within this Province;

unreasonable classification;

(c) Adopt, maintain or enforce any regulation, practice or measurement which shall be unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or otherwise in violation of law; nor shall any public utility as herein defined provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered by said Commission;

unjust or discriminatory regulations;

provide unsafe service or withhold service;

(d) Make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever;

give undue preference;

(e) Hereafter issue any stocks, stock certificates, bonds or other evidences of indebtedness, payable in more than one year from the date thereof, until it shall have first obtained authority from the Commission for such proposed issue. It shall be the duty of the Commission, after hearing, to approve of any such proposed issue maturing in more than one year from the date thereof, when satisfied that the same is to be made in accordance with law and the purpose of such issue be approved by said Commissioner;

issue securities covering more than one year without approval of Commission;

(f) Capitalize any franchise to be a corporation; capitalize any franchise in excess of the amount (exclusive of any tax or annual

capitalize its franchises excess

sively or for merger or issue bonds as lien on franchise;

charge) actually paid to the Province or any municipality thereof as the consideration of such franchise; capitalize any contract for consolidation, merger or lease; issue any bonds or other evidence of indebtedness against or as a lien upon any contract for consolidation, merger or lease; provided, however, that the provisions of this paragraph shall not prevent the issuance of stock, bonds or other evidences of indebtedness, subject to the approval of said Commissioner, by any lawfully merged or consolidated public utilities not in contravention of the provisions of this paragraph;

give free service to Government or municipal official;

(g) Hereafter give, grant or bestow upon any Government or municipal official any discrimination, gratuity or free service whatsoever, but nothing herein contained shall prevent the entry into any public conveyance or in or upon the property of any such public utility as herein defined of any such official in the pursuit of his public duties in connection with the particular conveyance or property so entered by him, upon exhibiting his authority so to do;

sell or encumber its assets or consolidate with other public utility without approval of Commission; saving as to ordinary course of business.

(h) Without the approval of the Commission, sell, lease, mortgage, or otherwise dispose of or incumber its property, franchises, privileges or rights, or any part thereof; or merge or consolidate its property, franchises, privileges or rights, or any part thereof, with that of any other public utility as herein defined. Every sale, lease, mortgage, disposition, incumbrance, merger or consolidation made in violation of any of the provisions hereof shall be void and of no effect. Nothing herein contained shall be construed in any wise to prevent the sale, lease or other disposition by any public utility as herein defined of any of its property in the ordinary course of its business.

Provincial public utility not to sell stock to another public utility, nor to allow other company to obtain control without consent of Commission.

24. No public utility as herein defined, incorporated under the laws of this Province, shall sell, nor shall any such public utility make or permit to be made upon its books any transfer of, any share or shares of its capital stock to any other public utility as herein defined, unless authorized to do so by the Commission. Nor shall any public utility as herein defined, incorporated under the laws of this Province, sell any share or shares of its capital stock or make or permit any transfer thereof to be made upon its books, to any corporation, domestic or foreign, the result of which sale or transfer, in itself or in connection with other previous sales or transfers, shall be to vest in such corporation a majority in interest of the outstanding capital stock of such public utility corporation unless authorized to do so by the Commission. Every assignment, transfer, contract or agreement for assignment or transfer by or through any person or corporation to any corporation in violation of any of the provisions hereof shall be void and of no effect, and no such transfer shall be made on the books of any public utility corporation. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired.

Assignments in violation of this section void.

Additional conditions as to telegraph, telephone, water, gas, heat, light and power utilities.

25. (1) In the case of a public utility which has for its object the construction, working or maintaining of telegraph, telephone or transmission lines, or the delivery or sale of water, gas, heat, light or power, the following conditions shall be fulfilled, over and above those which may be prescribed by the Commission, that is to say:—

- (a) The public utility shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building; Not to interfere with right of travel or access to buildings.
- (b) The public utility shall not permit any wire to be less than sixteen feet above such highway or public place, or erect more than one line of poles along any highway; Height of wires. Number of pole lines.
- (c) All poles shall be as nearly as possible straight and perpendicular; Poles to be straight and perpendicular.
- (d) The public utility shall not unnecessarily cut down or mutilate any shade, fruit or ornamental tree; Cutting down of trees.
- (e) The opening up of any street, square or other public place, for the erection of poles, or for the carrying of wires underground, shall be subject to the supervision of such person as the municipal council may appoint, and such street, square or other public place shall, without unnecessary delay, be restored as far as possible to its former condition; Opening up of streets.
- (f) If, for the purpose of removing buildings or in the exercise of the public right of travel, it is necessary that the said wires or poles be temporarily removed by cutting or otherwise, the public utility shall, at its own expense, upon reasonable notice in writing from any person requiring it, remove such wires and poles; and in default of the public utility so doing such person may remove such wires and poles at the expense of the public utility. Public utility to move wires to permit of moving buildings, etc.
- (2) The public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works. Public utility responsible for damage done.
- (3) The public utility, unless ordered by the Commission, shall not be entitled to compensation on account of its poles or wires being cut by order of the officer in charge of the fire brigade at any fire if, in the opinion of such officer, it is advisable that such poles or wires be cut. Public utility not entitled to compensation for damage done under orders of officer of fire brigade.
- (4) Every person engaged in erecting or repairing any line or instrument of the public utility shall have conspicuously attached to his dress a badge on which are legibly inscribed the name of the public utility and a number by which he can be readily identified. Employees to wear badge.
- (5) Nothing in this section shall be deemed to authorize the public utility to sell or distribute water, gas, light, heat, power or electricity in cities, towns or villages without having previously obtained by by-law the consent of the municipality thereto, unless such public utility has authority therefor by its charter. Section not to authorize public utility to do business without consent of municipality.
26. Every municipal council, whenever it deems that the interests of the public in a municipality or in a considerable part of a municipality are sufficiently concerned, may, by resolution, authorize the municipality to become a complainant or intervenant in any matter within the jurisdiction of the Commission; and for that purpose the council is authorized to take any steps and to incur any expense and to take any proceedings necessary to submit the question in dispute to the decision of the Commission, and if neces-

Municipality may be complainant before Commission.

sary to authorize the municipality to become a party to an appeal therefrom.

Commission may change or annul its orders.

27. Upon application made for that purpose, the Commission may, after hearing the parties and their witnesses, revise, change or annul a decision, order or rule previously given or made.

Commission to have general supervision over public utilities and may make regulations.

28. The Commission shall have a general supervision over all public utilities subject to the legislative authority of the Province, and may make such orders regarding equipment, appliances, safety devices, extension of works or systems, reporting and other matters, as are necessary for the safety or convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights. The Commission shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which public utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Commission.

Railway company not to abandon station without approval of Commission.

29. No railway company within the legislative authority of this Province shall, without first obtaining the approval of the Commission, abandon any railway station or stop the sale of passenger tickets, or cease to maintain an agent to receive and discharge freight, at any station now or hereafter established in this Province, at which passenger tickets are now or may hereafter be regularly sold or at which such agent is now or may hereafter be maintained.

No level crossings without consent of Commission.

30. No highway shall be constructed across the tracks of any such railway company at grade, nor shall the tracks of any such railway company, or of any street railway or traction company be laid across any highway, so as to make a new crossing at grade, nor shall the tracks of any such railway or street railway or traction company be laid across the tracks of any other railway or street railway or traction company, without first obtaining therefor permission from the Commission; provided, however, that this section shall not apply to the replacement of lawfully existing tracks.

Commission may order protective appliances at railway crossings.

31. Whenever it appears to the Commission that a public highway and a railway within the legislative authority of this Province cross one another, or that a public highway and a street railway cross one another, or that such a railway and a street railway cross one another at the same level, and that conditions at such grade crossing make it necessary for the protection of the travelling public at such grade crossing that gates be erected or that some other reasonable provision for the protection of the travelling public at such grade crossing should be adopted, the Commission may order and direct such railway company or such street railway company, or either or both of them, to install such protective device or devices or adopt such other reasonable provision for the protection of the travelling public at such crossing as in the discretion of the Commission shall be necessary.

Commission may require public utility to file list of chief officers.

32. Said Commission shall have power to require every public utility as herein defined to file with the Commission a statement in writing, verified by the oaths of the president and secretary thereof, respectively, setting forth the name, title of office or position and post-office address, and the authority, power and duties of every

officer, member of the board of directors, trustee, executive committee, superintendent, chief or head of construction and operation, or department division or line of construction and operation thereof, in such form as to disclose the source and origin of each administrative act, rule, decision, order or other action of the corporation, and shall, within ten days after any change is made in the title of, or authority, powers or duties appertaining to any such office or position, or the person holding the same, file with the Commission a like statement, verified in like manner, setting forth such change.

33. No privilege or franchise hereafter granted to any public utility as herein defined, by any municipality of this Province, shall be valid until approved by said Commission, such approval to be given when, after hearing, said Commissioner determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests, and the Commissioner shall have power in so approving to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interests may reasonably require.

No franchises to be granted without approval of Commission.

34. Every municipality operating any form of public utility service shall keep the accounts thereof in the manner prescribed by the Commission for the accounting of similar public utilities, and shall file with the said Commission such statements thereof as it may be directed so to do by said Commission.

Municipal public utilities to keep proper accounts.

35. Where, by any general or special Act, a public utility is authorized to amalgamate with any other public utility, such amalgamation shall be subject to the consent of the Commission, and shall have no effect until the order authorizing the same is published in *The Manitoba Gazette*.

Amalgamation of public utilities to be subject to consent of Commission.

36. If the Attorney-General, a municipality or any party interested makes a complaint to the Commission that any public utility, municipal corporation, company or person has unlawfully done or unlawfully failed to do, or is about unlawfully to do, or unlawfully not to do, something relating to a matter over which the Commission has jurisdiction as aforesaid, and prays that the Commission do make some order in the premises, the Commission shall, after hearing such evidence as it may think fit to require, make such order as it thinks proper under the circumstances.

Commission to act on complaint of Attorney-General, municipality or party interested.

37. The Commission may order and require any company or person or municipal corporation to do forthwith, or within or at any specified time, and in any manner prescribed by the Commission, so far as is not inconsistent with this Act or any other Act, any act, matter or thing which such company or person or municipal corporation is or may be required to do under this Act or any other Act, or any regulation, order or direction of the Commission, or under any agreement, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act, or any other Act, or any such regulation, order, direction or agreement, and shall have full jurisdiction to hear and determine all matters, whether of law or of fact, and shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise

Commission may require or forbid the doing of anything required or forbidden by this Act.

of its jurisdiction under this Act or any other Act, or otherwise for carrying this Act or any other Act, or any such regulation, order, direction or agreement into effect, have all such powers, rights and privileges as are vested in the Court of King's Bench.

Commission may authorize the performance of duties at expense of defaulter.

38. In case default shall be made in the doing of any act, matter or thing, which the Commission may direct to be done by the company or person or municipal corporation required to do the same, the Commission may authorize such person as it may see fit to do the act, matter or thing, and in every such case the person so authorized may do such act, matter or thing, and the expense incurred in the doing of the same may be recovered from the company or person or municipal corporation in default as money paid for and at the request of such company or person or corporation, and the certificate of the Commission of the amount so expended shall be conclusive thereof.

Commission may appoint officer to inquire and report upon complaints.

39. The Commissioner may appoint or direct any person to make an inquiry and report upon any application, complaint or dispute pending before the Commission, or any matter or thing over which the Commission has jurisdiction under this Act or any other Act, and may order and direct by whom and in what proportion the costs and expenses incurred in making such inquiry and report shall be paid, and may fix the amount of such costs and expenses.

Order as to costs.

Peace officers to be officers of Commission.

40. Sheriffs, deputy sheriffs, bailiffs, constables and other peace officers shall be ex-officio officers of the Commission and shall aid, assist and obey the Commission in the exercise of its jurisdiction conferred by this Act or any other Act whenever required so to do, and shall, upon the certificate of the secretary, be paid by the municipality or municipalities interested like fees as for similar services in the Court of King's Bench.

Signatures of Commissioner and secretary to documents need not be proved.

41. Every document purporting to be signed by the Commissioner and secretary, or either of them, or by any officer of the Commission, shall, without proof of any such signature, be *prima facie* evidence in all courts, and shall be sufficient notice to the public utility and all parties interested (if duly served therewith) that such document was duly signed and issued by the Commission or officer of the Commission, as the case may be; and, if such document purports to be a copy of any regulation, order, direction, decision or report made or given by the Commission or officer, it shall be *prima facie* evidence in all courts of such regulation, order, direction, decision or report, and when duly served on the public utility, or any person, shall be sufficient notice to the public utility, or any person of such regulation, order, direction, decision or report from time of such service.

PROCEDURE AND COSTS.

Commission may make rules of practice.

42. The Commission may make rules of practice regulating its procedure and the times of its sittings, in so far as are not inconsistent with this Act. Such rules of practice shall come into force from the date of their publication in *The Manitoba Gazette*.

43. Any summons to a witness may be signed by the Commissioner or by the secretary of the Commission, and shall be served in the same manner as a like summons is served in the Court of King's Bench.

Summons to witness, how signed and served.

44. The Commission may issue commissions to take evidence outside of Manitoba, and make all proper orders for the purpose and for the return and use of the evidence so obtained.

Taking evidence outside Manitoba.

45. The Commission shall, as respects the costs of all proceedings before it, the attendance and examination of witnesses, the production and inspection of tariffs, contracts, papers, books, accounts and all other documents, the enforcement of its orders, the entry on and inspection of property, the punishment of contempt of court and other matters necessary or proper for the due exercise of its jurisdiction, or for carrying this Act to effect, have all such powers, rights and privileges as are vested in the Court of King's Bench or a Judge thereof, including the ordering of costs to be paid by any party in its discretion.

Commission to have powers of Court of King's Bench in certain matters.

(a) When costs are ordered to be paid by any party to any other party, the same shall be fixed by the Commissioner.

Commissioner to fix costs.

46. The Commission may in its discretion accept and act upon evidence by affidavit or written affirmation or by the report of any officer or engineer appointed by it or obtained in such other manner as it may decide.

Evidence by affidavit.

47. All hearings and investigations before the Commission shall be governed by rules adopted by the Commission, and in the conduct thereof the Commissioner shall not be bound by the technical rules of legal evidence.

Conduct of hearings before Commission.

48. No person shall be excused from testifying or from producing any book, document or paper in any investigation or inquiry by or upon the hearing before said Commission, when ordered so to do by the Commissioner, upon the ground that the testimony or evidence, book, document or paper required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall, under oath, have testified or produced documentary evidence; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained is intended to give, or shall be construed as in any manner giving to any corporation immunity of any kind. No member or employee of the Commission shall be required to give testimony in any civil suit to which the Commission is not a party, with regard to information obtained by him in the discharge of his official duty.

Witness not excused on ground that evidence may incriminate him or subject him to penalty.

But such evidence not to be used against him, except for perjury.

Employee of Commission protected.

49. Copies of all official documents and orders filed or deposited in the office of the Commission, certified by the Commissioner, or by the secretary, to be true copies of the originals, under the official seal of the Commission, shall be evidence in like manner as the originals in all courts of this Province, and the Commissioner or

Certified copies of documents admissible.

secretary may charge and collect for such copies ten cents for each folio; the fees so collected shall be paid into the treasury of the Province.

Re-hearings,
modification of
orders.

50. The Commission at any time may order a re-hearing and extend, revoke or modify any order made by it.

Service of orders.

51. Every order made by the Commission shall be served upon the person or public utility, as herein defined, affected thereby, within ten days from the time said order is signed, or within such longer time as the Commissioner may direct, by personally delivering or by mailing a certified copy thereof, in a sealed package, with postage prepaid, to the person to be affected thereby, or, in case of a public utility, to any officer or agent thereof upon whom a summons may be served in accordance with the provisions of the law in this Province. All orders of the Commission to continue service or rates in effect at the time said order is made shall be immediately operative; all other orders shall become effective upon the date specified therein, which shall be at least twenty days after the date of said order, unless the Commission shall, for good reason, specially provide for an earlier date.

When orders
shall come into
force.

Penalty in default of compliance with order.

52. In default of compliance with any order of the Commission, when the same shall become effective, the person or public utility affected thereby shall be subject to a penalty of one hundred dollars per day for every day during which such default continues, the amount of such penalty to be fixed and determined by the Commissioner by order signed by him under the seal of the Commission.

Enforcing orders
of Commission
by sheriff.

53. (1) The observance of the orders of the Commission may be enforced by a written direction to the sheriff of any judicial district indorsed upon or annexed to a certified copy of any such order and signed by the said Commissioner; and, in the case of an order for payment of any money, costs, expenses or penalty, the sheriff receiving such direction shall levy the amount with his costs and expenses in like manner and with the same powers as if the order were an execution against the goods of the party to pay issued out of the Court of King's Bench.

Order for
payment of
money to be lien
on lands.

(2) In the case of an order of the Commission for payment of any money, costs, expenses or penalty, a certificate of the order, signed by the secretary, may be registered in the office of any registration district or land titles office in the Province, and when so registered shall constitute a lien and charge upon any lands or interest therein of the party or person or company ordered to pay the money in the registration district or land titles district in which such office is situated to the same extent and in the same manner as such lands would be bound by the registration of a certificate of a judgment of the Court of King's Bench. The amount ordered to be paid by any such order so registered may be realized in the same manner and by similar proceedings as the amount of any registered judgment of the Court of King's Bench may be realized.

Doing or aiding
in doing things
forbidden by Act.

54. Any person who shall knowingly and wilfully perform, commit or do, or participate in performing, committing or doing, or who shall knowingly and wilfully cause, participate or join with others

in causing, any public utility or corporation or company to do, perform or commit, or who shall advise, solicit, persuade or knowingly and wilfully instruct, direct or order any officer, agent or employee of any public utility, corporation or company, to perform, commit or do any act or thing forbidden or prohibited by this Act, shall be guilty of an offence against this Act.

55. Any person who shall knowingly and wilfully neglect, fail or omit to do or perform, or who shall knowingly and wilfully cause or join or participate with others in causing any public utility, corporation or company to neglect, fail or omit to do or perform, or who shall advise, solicit or persuade, or knowingly and wilfully instruct, direct or order any officer, agent or employee of any public utility, corporation or company to neglect, fail or omit to do, any act or thing required to be done by this Act, shall be guilty of an offence against this Act.

Neglect of duty imposed by Act.

56. Any public utility, corporation or company which shall perform, commit or do any act or thing hereby prohibited or forbidden, or which shall neglect, fail or omit to do or perform any act or thing hereby required to be done or performed by it, shall be guilty of an offence against this Act.

Disobedience of Act by public utility.

57. This Act shall not have the effect to release or waive any right of action by the Commission or by any person for any right, penalty or forfeiture which may have arisen, or which may arise, under any of the laws of this Province, and any penalty or forfeiture enforceable under this Act shall not be a bar to or affect the recovery for a right, or affect or bar any action at law or prosecution, against any public utility as herein defined, or person or persons operating such public utility, its officers, directors, agents or employees.

Rights and penalties under other Acts not affected.

58. The Commissioner or any person authorized by the Commission to make any inquiry or report may—

(a) Enter upon and inspect any place, building or works being the property or under the control of any public utility;

Commission may enter and inspect lands and buildings; inspect works, etc.;

(b) Inspect any works, structure, rolling stock or other property of such public utility;

(c) Require the attendance of all such persons as he thinks fit to summon and examine, and take the testimony of such persons;

summon and examine witnesses;

(d) Require the production of all books, plans, specifications, drawings and documents;

require production of books, etc.;

(e) Administer oaths, affirmations or declarations; and shall have the like powers to summon witnesses, enforce their attendance, and compel them to give evidence and produce the books, plans, specifications, drawings and documents, which they may require them to produce as is vested in any court in civil cases.

administer oaths.

59. The fact that a receiver, manager or other official of any public utility, or a sequestrator of the property thereof, has been appointed by any court in the Province, or is managing or operating

Receiver, sequestrator, etc., subject to Commission.

a public utility under the authority of any such court, shall not prevent the exercise by the Commission of any jurisdiction conferred by this Act; but every such receiver, manager or official shall be bound to manage and operate any such public utility in accordance with this Act and with the orders and directions of the Commission, whether general or referring particularly to such public utility; and every such receiver, manager or official, and every person acting under him, shall obey all orders of the Commission within its jurisdiction in respect of such public utility, and be subject to have them enforced against him by the Commission notwithstanding the fact that such receiver, manager, official or person is appointed by, or acts under the authority, of any court.

Provisional orders.

60. (1) The Commissioner may, if the special circumstances of any case so require, make a provisional order, after notice, and, in cases of urgency, without notice, authorizing, requiring or forbidding anything to be done which the Commissioner would be empowered, in a contested case, to authorize, require or forbid; and such provisional order shall remain in force until the final decision of the Commission, or, in case of appeal, until the final judgment of the Court of Appeal.

Application to set aside provisional order.

(2) If a provisional order has been made without notice, any interested party may, at any time before final order or judgment, apply by petition to have the same modified or set aside.

Commission may grant order on terms and conditions.

61. The Commission may direct in any order that such order or any portion thereof shall come into force at a future time, or upon the happening of any contingency, event or condition in such order specified, or upon the performance, to the satisfaction of the Commissioner, or person named by him, of any terms which the Commissioner may impose upon any party interested, and the Commissioner may direct that the whole or any portion of such order shall have force for a limited time, or until the happening of a specified event.

Orders as to construction of works, etc.

By whom carried out.

62. When, in the exercise of the powers conferred upon it by this Act or by any special Act, the Commission directs any structure, appliances, equipment or works to be provided, constructed, reconstructed, altered, repaired, installed, used or maintained, it may order by what company, municipality or persons interested, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, such work shall be carried out.

Extension of time for carrying out order.

63. When any order of the Commission requires any work, act or thing to be performed or done within a specified time, the Commission may, upon notice, extend the time so specified.

Public utility to notify officers of orders of Commission.

64. Every public utility shall, as soon as possible after having received or having been served with any order or other document of the Commission, notify the same to each of its or his officers and servants performing duties which are or may be affected thereby, by delivering a copy to him or by posting up a copy in some place where his work or duties or some of them are to be performed.

65. The decision of the Commission upon any question of fact or law within its jurisdiction, shall be final, and be *res judicata*. Decision of Commission *res judicata*.

66. (1) The Commissioner may take such steps and employ such persons as are necessary for the enforcement of any order made by him, and for the purposes thereof may forcibly or otherwise enter upon, seize and take possession of the whole or part of the movable and immovable property of such public utility, together with the books and offices thereof, and may, until such order has been enforced, assume and take over the management of the business thereof for and in the interest of the shareholders and the public, and all or any of the powers, duties, rights and functions of the directors and officers of the public utility in all respects, including the employment and dismissal of officers and servants thereof, for such time as the Commissioner continues to direct such management. Enforcement of orders by seizure of books and property of public utility.

Management of business until order is enforced.

(2) Upon the Commission so taking possession of such property, it shall be the duty of every officer and employee of the public utility to obey the orders of the Commission or of such person or persons as it places in authority in the management of any or all departments of the undertaking. Employees of utility to obey person placed in charge.

(3) The Commission may, upon so taking possession of such undertaking and property, determine, receive and pay out all moneys due to or owing by the public utility, and give cheques, acquittances and receipts for moneys to the same extent and as fully as the proper officers thereof could do if no such possession had been taken. Commission to receive and pay out moneys.

(4) The costs and expenses of and incidental to proceedings to be taken by the Commission under this section shall be in the discretion of the Commission, and the Commission may direct by whom and to what extent they shall be paid. Costs.

67. If it is proved that a public utility has not complied with an order given by the Commission, and if it is of opinion that there are no effectual means of compelling the public utility to obey such order, the Commissioner, as an alternative, shall transmit to the Attorney-General a certificate, signed by the Commissioner and secretary, setting form the nature of the order and the default of the public utility in complying therewith. Such default so established shall be ground, after public notice in *The Manitoba Gazette* of the receipt of the said certificate by the Attorney-General, for an action to dissolve the public utility or to annul the letters patent incorporating it. The proceedings upon such action shall be governed by the rules in force under "The King's Bench Act" as nearly as may be. Public utility in default may be dissolved.

68. No order involving any outlay, loss or deprivation to any public utility, municipality or person shall be made without due notice and full opportunity to all parties concerned, to make proof and be heard at a public sitting of the Commission, except in case of urgency, and in such case, as soon as practicable thereafter, the Commission shall, on the application of any party affected by such order, re-hear and re-consider the matter and make such order as shall seem just. Order involving outlay not to be ex-parte except in cases of urgency.

ANNUAL REPORT.

Annual report,
contents of.

69. (1) The Commission shall, in the month of January in each year, transmit to the Attorney-General, for the year ending on the thirtieth day of November previous, a report showing briefly—

(a) Application to the Commission and summaries of the orders made thereon;

(b) The number and the nature of the inquiries which it has held of its own motion;

(c) Such matters as the Lieutenant-Governor-in-Council directs.

Report to be
laid before Le-
gisature.

(2) The report shall be laid before the Legislative Assembly during the first fifteen days of the then next session, or within fifteen days after its receipt if the Legislature shall be then sitting.

Substantial
compliance with
Act sufficient.

70. A substantial compliance with the requirements of this Act shall be sufficient to give effect to all the rules, orders, acts and regulations of the Commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.

APPEAL.

Findings of Com-
mission conclus-
ive.

71. (1) The decision of the Commission upon any question of fact or law within its jurisdiction, and as to whether any company, municipality or person is or is not a party interested within the meaning of this Act, shall be binding and conclusive upon all companies and persons and municipal corporations and in all courts.

Jurisdiction of
Commission ex-
clusive.

(2) The Commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act, and, save as herein otherwise provided, no order, decision or proceeding of the Commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any court, even when the question of its jurisdiction is raised.

Jurisdiction need
not be shown on
proceedings.

(3) No order of the Commission need show upon its face that any proceeding or notice was had or given, or any circumstance existed necessary to give it jurisdiction to make such order.

Commissioner
not bound by
findings of other
courts on ques-
tions of fact.

(4) In determining any question of fact, the Commission shall not be concluded by the finding or judgment of any other court in any suit, prosecution or proceeding involving the determination of such fact, but such finding or judgment shall, in proceedings before the Commission, be *prima facie* evidence only.

Pending litiga-
tion not to affect
jurisdiction.

(5) The pendency of any suit, prosecution or proceeding in any other court, involving questions of fact, shall not deprive the Commission of jurisdiction to hear and determine the same questions of fact.

Appeal on ques-
tion affecting
jurisdiction.

72. An appeal shall lie to the Court of Appeal, in conformity with the rules governing appeals to that Court from the Court of King's Bench or a Judge thereof, from any final decision of the Commission upon any question involving the jurisdiction of the

Commission, but such appeal can be taken only by permission of a Judge of the Court of Appeal given upon a petition presented to him within fifteen days from the rendering of the decision, notice of which petition must be given to the parties and to the Commission within said fifteen days. The costs of such application shall be in the discretion of the said Judge.

73. The delay to appeal shall begin to run from the day on Time for appeal. which the decision of the Commission has been served upon the party or upon his solicitor.

74. When the petition to appeal has been granted the appeal *Præcipe* for shall be brought by a *præcipe* filed in the office of the secretary of appeal. the Commission and with the registrar of the Court of Appeal within eight days after the permission to appeal has been granted. The *præcipe* must contain a statement of the names of the parties and their addresses, the date of the order appealed from, and a statement of its effect and of the grounds of the appeal, and the date, hour and place when and where the security hereinafter mentioned will be given, and, in case money is not deposited as security, the names and addresses of the proposed surety or sureties. After the *præcipe* has been filed and within the said eight days a copy of it must be served upon the adverse party or parties.

75. At the time mentioned in the *præcipe* which must be within Security for five days after the filing of it, or within such further delay as the appeal. Commission may order, the appellant shall give security before the secretary of the Commission in conformity, as nearly as may be, with the rules governing the giving of security for costs in an action in the Court of King's Bench.

76. In other respects the proceedings upon appeals taken in Procedure on virtue of this Act, until final judgment by the Court of Appeal, shall appeal. be in conformity, as nearly as may be, with the rules governing appeals to the said Court from the Court of King's Bench or a Judge thereof.

77. The Court of Appeal shall thereafter determine the matter Determination referred to it, or upon which the appeal is taken, and shall make of appeal. such order as shall appear just and shall adjudge the costs of such appeal in its discretion and order that the record be transmitted to the secretary of the Commission by the registrar of the Court of Appeal, who shall annex to the record a copy of the judgment of the court. Payment of any costs so ordered may be enforced in the same manner as payment of costs ordered by the Commission to be paid.

78. Every order of the Commission shall go into effect at the Stay of proceed- time prescribed by the order, and its operation shall not be suspended ings upon appeal. by any such appeal to the Court of Appeal unless otherwise ordered by the Judge granting the permission to appeal or by the Court of Appeal; but the Commission itself may suspend the operation of its order, when appealed from, until the decision of the Court of Appeal is rendered, if the Commissioner thinks fit.

79. Every municipal corporation owning or operating any public Bringing utility within the meaning of this Act may by by-law of the council municipal

owned utility
under Act.

thereof, approved of by the Lieutenant-Governor-in-Council, provide that such public utility shall come under the operation of this Act and be subject to the control and orders of the said Commission; and, in case any such by-law is so passed and approved, the public utility owned and operated by such municipality shall thereafter come under the operation of this Act and under the control and management of the said Commission.

Preference of
Commission's
business in
court.

80. Any proceeding in any court of this Province directly affecting an order of the Commission, or to which the Commission is a party, shall have preference over all other civil proceedings pending in such court.

Passes and
franks to
employees and
others.

81. Nothing in this Act shall be construed to prevent the issue, by any steam railway, street railway, traction, canal, express, telephone or telegraph companies, or other common carriers, of free passes or franks to their employees, officers, agents, surgeons, physicians, solicitors and their families, and the interchange between said public utilities and common carriers of passes or franks for their employees, officers, agents, surgeons, physicians, solicitors and their families.

Ultra vires of
any section not
to affect others.

82. If, for any reason, any section or provision of this Act shall be questioned in any court, and shall be held to be unconstitutional or invalid, no other section or provision of this Act shall be affected thereby.

Penalties.

83. Every person or public utility guilty of an offence under this Act shall, in addition to all other penalties, be liable, on summary conviction before a police magistrate or two justices of the peace, to a fine of not less than fifty dollars nor more than five hundred dollars, besides costs of prosecution, and, in default of payment, if an individual, to imprisonment for a term not exceeding six months.

Repeal of
inconsistent
enactments.

84. All Acts and parts of Acts inconsistent with this Act are hereby repealed.

85. This Act shall come into force on the day it is assented to.

APPENDIX E.

STANDING ORDERS OF THE HOUSE OF COMMONS OF
THE UNITED KINGDOM, 1906.

For the purposes of the Standing Orders of this House, all Private Bills to which the Standing Orders are applicable shall be divided into the Two following classes, according to the subjects to which they respectively relate:—

2nd Class:—Making, Maintaining, Varying, Extending or Enlarging any
 Aqueduct. Harbour.
 Archway. Navigation.
 Bridge. Pier.
 Canal. Port.
 Cut. Public Carriage Road
 Dock. Railway.
 Drainage—where it is not provided in the Bill that the Cut shall not be more than Eleven feet wide at the bottom. Reservoir.
 Sewer.
 Street.
 Subway.
 Embankment for reclaiming Land from the Sea or any Tidal River. Tramway.
 Tramroad.
 Tunnel.
 Waterworks.
 Ferry, where any work is to be executed.

24. In cases of Bills of the Second Class, a Plan and also a Duplicate thereof, together with a Book of Reference thereto, and a Section and also a Duplicate thereof, as hereinafter described and in cases of Bills of the First Class, under the powers of which any lands or houses may be taken or used compulsorily, and in the case of all Bills by which any charge is imposed upon any lands or houses, or any lands or houses are rendered liable to have a charge imposed upon them in respect of any improvement, a Plan and Duplicate thereof, together with a Book of Reference thereto, shall be deposited for public inspection at the office of the Clerk of the Peace for every County, Riding, or Division in *England* or *Ireland*, or in the office of the Principal Sheriff Clerk of every County in *Scotland*, and where any County in *Scotland* is divided into districts or divisions, then also in the office of the Principal Sheriff Clerk, in or for each district or division, in or through which the Work is proposed to be made, maintained, varied, extended or enlarged, or in which such lands or houses are situate, on or before the 30th day of November immediately preceding the application for the Bill; and in the case of Railway Bills, the Ordnance Map on the scale of one inch to a mile, with the line of Railway delineated thereon, so as to show its general course and direction, shall be deposited with such Plans, Sections, and Book of Reference; and the Clerks of the Peace or Sheriff Clerks, or their respective Deputies, shall make a Memorial in writing upon the Plans, Sections, and Books of Refer-

Private Bills
divided into
two classes.

Deposit of Plans,
Books of Refer-
ence and sec-
tions with Clerk
of the Peace, etc.

ence so deposited with them, denoting the time at which the same were lodged in their respective offices, and shall at all seasonable hours of the day permit any person to view and examine one of the same, and to make copies or extracts therefrom; and *one* of the two Plans and Sections so deposited shall be sealed up and retained in the possession of the Clerk of the Peace or Sheriff Clerk until called for by order of one of the two Houses of Parliament. In cases of Bills whereby it is proposed to alter or extend the Municipal Boundary of any City, Borough, or Urban District, a Map on a scale of not less than three inches to a mile, and also a Duplicate thereof, showing as well the present Boundaries of the City, Borough, or Urban District as the Boundaries of the proposed Extension, shall be deposited with the Town Clerk of such City or Borough, or clerk of such Urban District, who shall at all seasonable hours of the day permit any person to view and examine such Map, and to make copies thereof; and a copy of the said Map, with the said Boundaries delineated thereon, shall also be deposited at the office of the Board of Agriculture and Fisheries.

Deposit of
plans, etc., in
Private Bill
Office.

25. On or before the 30th day of November, a copy of the said Plans, Sections and Books of Reference, and in the case of Railway Bills, also a copy of the Ordnance Map, with the line of Railway delineated thereon, shall be deposited in the Private Bill Office of this House.

Deposit of
Tramway Map
with Board of
Trade.

25a. In the case of Bills for laying down a Tramway, an Ordnance Map of the district on a scale of not less than six inches to a mile, with the line of the proposed Tramway marked thereon, and a Diagram on a scale of not less than two inches to a mile, prepared in accordance with the specimen to be obtained at the Office of the Board of Trade, must also be deposited at that Office on or before the 30th November.

Deposit of
Maps in case of
Bills for supply
of electrical
energy.

25b. In cases of Bills for the supply of electrical energy, an Ordnance Map on a scale of not less than one inch to the mile, with the proposed area of supply marked thereon, shall be deposited at the Office of the Board of Trade on or before the 30th day of November.

Deposit in case
of Bill affecting
Tidal Lands.

26. In cases where Tidal lands within the ordinary Spring Tides are to be acquired, or in any way affected, a copy of the Plans and Sections shall, on or before the 30th day of November immediately preceding the application for the Bill, be deposited at the Office of the Harbour Department, Board of Trade, marked 'Tidal Waters,' and on such copy all Tidal Waters shall be coloured blue, and if the Plans include any Bridge across Tidal Waters, the dimensions, as regards span and headway of the nearest Bridges, if any, across the same Tidal Waters above and below the proposed new Bridge, shall be marked thereon; and in all such cases, such Plans and Sections shall be accompanied by an Ordnance Map of the country over which the Works are proposed to extend, or are to be carried, with their position and extent, or route accurately laid down thereon.

Deposit in case
of Bill affecting

26a. And, in cases where the work is to be situate on the banks, foreshore, or bed of any river, a copy of the Plans and Sections

shall, on or before the 30th day of November immediately preceding the application for the Bill, be deposited—

Banks, etc., of river.

- (1) if the river is in England or Wales, at the Office of the Board of Agriculture and Fisheries;
- (2) or, if the river is in Scotland, at the Office of the Secretary for Scotland;
- (3) or, if the river is in Ireland, at the Irish Office, Westminster, and at the Office of the Department of Agriculture and Technical Instruction for Ireland, Dublin;
- (4) and if the river is subject to a Board of Conservators, at the Office also of such Board;

and if the Plans include any tunnel under or Bridge over the River, the dimensions as regards depth below bed of the River, and span and headway, shall be marked thereon; and such Plans shall be accompanied by an Ordnance Map of the country over which the works are proposed to extend or are to be carried, with their position and extent or route accurately laid down thereon.

27. In the case of Railway, Tramway, and Canal Bills, a Copy of all Plans, Sections, and Books of Reference, required to be deposited in the Office of any Clerk of the Peace or Sheriff Clerk, on or before the 30th day of November immediately preceding the application for the Bill (and in the case of Railway Bills also a Copy of the Ordnance Map, with the Line of Railway delineated thereon), shall on or before the same day be deposited in the Office of the Board of Trade.

Deposit of Plans, etc., with Board of Trade.

32. Every Petition for a Private Bill, headed by a short Title descriptive of the Undertaking or Bill, corresponding with that at the head of the Advertisement, with a Declaration, signed by the Agent, and a printed copy of the Bill annexed, shall be deposited in the Private Bill Office on or before the 17th Day of December; and such Petition, Bill and Declaration shall be open to the inspection of all parties; and printed copies of the Bill shall also be delivered therewith for the use of any Member of the House or Agent who may apply for the same. Such Declaration shall state to which of the two Classes of Bills such Bill, in the judgment of the Agent, belongs; and if the proposed Bill shall give power to effect any of the following objects; that is to say:—

Petition for Bill, etc., to be deposited in Private Bill office.

Power to take any lands or houses compulsorily, or to extend the time granted by any former Act for that purpose;

Power to levy tolls, rates or duties, or to alter any existing tolls, rates or duties; or to confer, vary or extinguish any exemption from payment of tolls, rates or duties, or to confer, vary or extinguish any other right or privilege;

Power to amalgamate with any other Company, or to sell or lease their Undertaking, or to purchase or take on lease the Undertaking of any other Company;

Power to interfere with any Crown, Church or Corporation property, or property held in trust for public or charitable purposes;

Power to relinquish any part of a work authorized by a former Act;

Power to divert into any existing or intended cut, canal, reservoir, aqueduct or navigation, or into any intended variation, extension or enlargement thereof respectively, any water from any existing cut, canal, reservoir, aqueduct or navigation, whether directly or derivatively, and whether under any agreement with the proprietors thereof, or otherwise;

Power to make, vary, extend or enlarge any cut, canal, reservoir, aqueduct or navigation;

Power to make, vary, extend or enlarge any Railway.

The said Declaration shall state which of such powers are given by the Bill, and shall indicate in which clauses of the Bill (referring to them by their number) such powers are given, and shall further state that the Bill does not give power to effect any of the objects enumerated in this Order, other than those stated in the Declaration.

If the proposed Bill shall not give power to effect any of the objects enumerated in the preceding Order, the said Declaration shall state that the Bill does not give power to effect any of such objects.

The said Declaration shall also state that the Bill does not give any powers other than those included in the Notices for the Bill.

Deposit of
Estimates, etc.,
in Private Bill
Office.

35. All Estimates and Declarations, and Lists of Owners, Lessees and Occupiers, which are required by the Standing Orders of this House, shall be deposited in the Private Bill Office on or before the 31st day of December.

Documents to be
deposited in Pri-
vate Bill Office
in regard to
Joint Stock Com-
panies Bill.

35a. As respects all Bills for the incorporation of Joint Stock Companies, or proposed Companies for carrying on any Trade or Business, or for conferring upon such Companies the power of suing and being sued, there shall be deposited in the Private Bill Office, on or before 31st December, a copy of the Deed or Agreement of Partnership (if any) under which the Company or proposed Company is acting, and in all cases other than those of Companies registered under 'The Companies Act, 1862,' a Declaration stating the following matters:—

- 1st.—The present and proposed amount of the Capital of the Company.
- 2nd.—The number of Shares, and the amount of each Share.
- 3rd.—The number of Shares subscribed for.
- 4th.—The amount of Subscriptions paid up.
- 5th.—The names, residences, and descriptions of the Shareholders or Subscribers (so far as the same can be made out), and of the actual or provisional Directors, Treasurers, Secretaries or other officer, if any.

And such documents shall be verified by the signature of some authorized officer of the Company or proposed Company (if any), and by some responsible party promoting the Bill; and copies of such Declarations shall be printed at the expense of the Promoters of the Bill, and delivered at the Vote Office for the use of the Members of

the House, and at the Private Bill Office for the use of any Agent who may apply for the same.

36. On or before 31st December, copies of the Estimate of Ex-
 pense of the Undertaking; and where a Declaration alone, or Decla-
 ration and Estimate of the probable amount of Rates and Duties, are
 required, copies of such Declaration, or of such Declaration and
 Estimate, shall be printed at the expense of the Promoters of the
 Bill, and delivered at the Vote Office for the use of the Members of
 the House, and at the Private Bill Office for the use of any Agent
 who may apply for the same.

Copies of Esti-
 mates and Decla-
 ration to be
 printed and de-
 livered at Pri-
 vate Bill Office.

37. The Estimate for any Works proposed to be authorized by
 any Railway, Tramway, Tramroad, Canal, Dock, or Harbour Bill,
 shall be in the following form, or as near thereto as circumstances
 may permit:—

Form of Esti-
 mate.

ESTIMATE OF THE PROPOSED (RAILWAY)

LINE NO.	Miles.	F.	Ch.	} Whether single or double.		
Length of line.....						
Earthworks:	Cubic yds.	Price per yd.	£ s. d.	£ s. d.		
Cuttings—Rock.....						
Soft soil.....						
Roads.....						
Total.....						
Embankments, including roads.....	Cubic yds.					
Bridges—Public roads.....	Number.....					
Accommodation bridges and works.....						
Viaducts.....						
Culverts and drains.....						
Metallings of roads and level crossings.....						
Gatekeepers' houses at level crossings.....						
Permanent way, including fencing:	Miles.	fgs.	chs.	Cost per mile.		
			at	£ s. d.		
Permanent way for sidings and cost of junctions.....						
Stations.....						
Contingencies				per cent.		
Land and buildings:	A.	R.	P.			
Total.....				£		

The same details for each Branch, and General Summary of total cost.

ESTIMATES AND DEPOSIT OF MONEY, AND DECLARATIONS IN CERTAIN CASES.

56. An Estimate of the Expense of the Undertaking under each
 Bill of the Second Class shall be made and signed by the person
 making the same.

Estimate in Bills
 of the Second
 Class.

Percentage to be deposited.

57. In the case of a Railway Bill or Tramway Bill, authorizing the construction of Works by other than an existing Railway Company or Tramway Company, incorporated by Act of Parliament, possessed of a railway or tramway already opened for public traffic, and which has during the year last past paid dividends on its 'ordinary Share Capital, and which does not propose to raise under the Bill a capital greater than its existing authorized capital, a sum not less than Five per cent on the amount of the Estimate of Expense, or in the case of substituted works, on the amount by which the expense thereof will exceed the expense of the works to be abandoned, and in the case of all Bills other than Railway Bills and Tramway Bills, a sum not less than Four per cent on the amount of such Estimate, or of such excess as aforesaid, shall, previously to the 15th day of January, be deposited with the Paymaster General for and on behalf of the Supreme Court of Judicature in England, if the Work is intended to be done in England, or with the Paymaster General for and on behalf of the Supreme Court of Judicature in England, or with the King's and Lord Treasurer's Remembrancer on behalf of the Court of Exchequer in Scotland, if the Work is intended to be done in Scotland, or with the Accountant General of the Supreme Court of Judicature in Ireland, if the Work is intended to be done in Ireland.

Cases in which Declarations may be deposited in Lieu of Money.

58. Where the Work is to be made, wholly or in part, by means of Funds, or out of Money to be raised upon the credit of present Surplus Revenue, belonging to any Society or Company, or under the control of Directors, Trustees or Commissioners, as the case may be, of any existing Public Work, such parties being the Promoters of the Bill, a Declaration stating those facts, and setting forth the nature of such control, and the nature and amount of such Funds or Surplus Revenue, and showing the actual Surplus of such Funds or Revenue, after deducting the Funds required for purposes authorized by any Act or Acts of Parliament, and also the Funds which may be required for any other Work to be executed under any Bill in the same Session, and given under the common seal of the Society or Company, or under the hand of some authorized Officer of such Directors, Trustees or Commissioners, may be deposited, and in such case no deposit of money shall be required in respect of so much of the Estimate of Expense as shall be provided for by such Surplus Funds.

PROCEEDINGS OF, AND IN RELATION TO, THE CHAIRMAN OF THE COMMITTEE OF WAYS AND MEANS, AND THE COUNSEL TO MR. SPEAKER.

Chairman of Ways and Means to seek a conference with Chairman of Committees of House of Lords.

79. The Chairman of the Committee of Ways and Means, or the Counsel to Mr. Speaker, shall, on or before the 28th day of January in each year, seek a conference with the Chairman of Committees of the House of Lords, or with his Counsel, for the purpose of determining in which House of Parliament the respective Private Bills should be first considered, and such determination shall be reported to The House.

Chairman of Ways and Means to examine Private Bills, etc.

80. The Chairman of the Committee of Ways and Means, with the assistance of the Counsel to Mr. Speaker, shall examine all Private Bills, whether opposed or unopposed, and call the attention of The House, and also of the Chairman of the Committee on every

opposed Private Bill, to all points which may appear to him to require it; and Copies of all such Bills shall be laid by the Agent before the said Chairman and Counsel not later than the day after the Examiner of Petitions shall have indorsed the Petition for the Bill.

PROCEEDINGS OF, AND IN RELATION TO, THE REFEREES ON PRIVATE BILLS.

87. The Chairman of Ways and Means, and the Deputy Chairman, with not less than Seven other persons, who shall be Members of this House, and shall be appointed by Mr. Speaker for such periods as he shall think fit, shall be Referees of The House on Private Bills, and shall have the assistance of the Counsel to Mr. Speaker; such Referees to form one or more Courts, three at least to be required to constitute each Court.

Referees on Private Bills to be constituted.

88. The practice and procedure of the Referees, their times of sitting, order of business, and the forms and notices required in their proceedings, shall be prescribed by rules, to be framed by the Chairman of Ways and Means, subject to alteration by him as occasion may require, but only one Counsel shall appear before such Referees in support of a Private Bill, or in support of any Petition in opposition thereto, unless specially authorized by the Referees. All such rules and alterations, when made, to be laid on the Table of The House.

Rules of practice and procedure to be made by Chairman of Ways and Means.

89. The Referees shall decide upon all Petitions against Private Bills, or against Provisional Orders, or Provisional Certificates, as to the rights of the Petitioners to be heard upon such Petitions, without prejudice, however, to the power of the Select Committee to which the Bill is referred to decide upon any question as to such rights arising incidentally in the course of their proceedings.

Referees on Private Bills to decide as to *locus standi* of Petitioners.

129. It shall be competent to the Referees on Private Bills to admit Petitioners to be heard upon their Petitions against a Private Bill, on the ground of competition, if they shall think fit.

Competition to be a ground of *locus standi*.

133. Where any body of persons corporate or unincorporated sufficiently representing a particular trade, business, or interest, in any district to which any Railway Bill relates, petition against the Bill, alleging that such trade, business, or interest will be injuriously affected by the rates and fares proposed to be authorized by the Bill, or is injuriously affected by the rates and fares already authorized by Acts relating to the Railway undertaking, it shall be competent to the Referees on Private Bills, if they think fit, to admit the Petitioners to be heard on such allegation, against the Bill, or any part thereof, or against the rates and fares authorized by the said Acts, or any of them.

Locus standi of bodies representing trade, etc.

The provisions of this Order relative to rates and fares already authorized, extend to Traders and Freighters, and to a single Trader, in any case where a *locus standi* would have been allowed to them or him if this Order had not been made.

Nothing in this Order shall authorize the Referees to entertain any question within the jurisdiction of the Railway Commissioners.

Locus standi of association, etc.

133a. Where any society or association sufficiently representing a trade, business, or interest in any district to which any Bill relates, petition against the Bill, alleging that such trade, business, or interest will be injuriously affected by the provisions contained therein, it shall be competent to the Referees on Private Bills, if they think fit, to admit the Petitioners to be heard on such allegations against the Bill or any part thereof.

Locus Standi of Municipal authorities and Inhabitants of Towns.

134. It shall be competent to the Referees on Private Bills to admit the Petitioners, being the Municipal or other authority having the local management of the Metropolis, or of any Town, or the Inhabitants of any Town or District alleged to be injuriously affected by a Bill, to be heard against such Bill, if they shall think fit.

Local authority to have a *locus standi* against Lighting and Water Bills.

134a. The Municipal or other local authority of any town or district alleging in their Petition that such town or district may be injuriously affected by the Provisions of any Bill relating to the lighting or water supply thereof, or the raising of capital for any such purpose, shall be entitled to be heard against such Bill.

Tolls, etc.

145a. In the case of any Bill relating to a Railway, Tramway, Canal, Dock, Harbour, Navigation, Pier, or Port, seeking powers to levy tolls, rates, or duties in excess of those already authorized for that undertaking, or usually authorized in previous years for like undertakings, the Bill shall not be reported by the Committee until a Report from the Board of Trade on the powers so sought has been laid before the Committee; and the Committee shall report specially to the House in what manner the recommendations or observations in the Report of the Board of Trade, and also in what manner the clauses of the Bill relating to the powers so sought, have been dealt with by the Committee.

Restrictions as to Mortgage.

153. In the case of a Railway or Tramway Bill, a Company shall not be authorized to raise, by Loan or Mortgage, a larger sum than One-third of their capital; or until Fifty per cent on the whole of the capital shall have been paid up, to raise any Money, by Loan or Mortgage, unless the Committee on the Bill shall report that such restrictions or either of them ought not to be enforced, with the reasons on which their opinion is founded.

Acquisition of Canals, Docks, etc., by Railway Companies.

156. No Railway Company shall be authorized to construct or enlarge, purchase, or take on lease, or otherwise appropriate any Canal, Dock, Pier, Harbour, or Ferry, or to acquire and use any Steam-vessels for the conveyance of goods and passengers, or to apply any portion of their capital or revenue to other objects, distinct from the Undertaking of a Railway Company, unless the Committee on the Bill report that such a restriction ought not to be enforced, with the reasons and facts upon which their opinion is founded.

Generating Stations.

157a. In the case of any Bill relating to the generation of electricity for supply to persons or bodies other than the promoters, the Bill shall not be reported by the Committee until a Report from the Board of Trade on the powers sought has been laid before the Committee; and the Committee shall report specially to The House in what manner the recommendations or observations in the Report of the Board of Trade, and also in what manner the clauses of the Bill

relating to the powers sought, have been dealt with by the Committee.

159. The Committee on every Railway Bill shall fix the maximum Rates of Charge for the conveyance of Passengers, with a due amount of Luggage, such rates to include every expense incidental to such conveyance, and shall also fix the Charges for the conveyance of Parcels by passenger train; but if the committee shall not deem it expedient to determine such maximum Rates of Charge, a Special Report, explanatory of the grounds of their omitting so to do, shall be made to The House, which Special Report shall accompany the Report of the Bill.

Committee to fix the Rates and Charges.

160. In every Railway Bill by which it is proposed to authorize the Company to grant any preference or priority in the payment of Interest or Dividends on any Shares or Stock, there shall be inserted a Clause providing that the granting of such preference or priority shall not prejudice or affect any preference or priority in the payment of Interest or Dividends on any other Shares or Stock which shall have been granted by the Company in pursuance of or which may have been confirmed by any previous Act of Parliament, or which may otherwise be lawfully subsisting, unless the Committee on the Bill shall report that such Provision ought not to be required, with the Reasons on which their opinion is founded.

Provision as to preference in payment of interest.

161. No Railway Company shall be authorized to alter the terms of any preference or priority of Interest or Dividend which shall have been granted by such Company in pursuance of or which may have been confirmed by any previous Act of Parliament, or which may otherwise be lawfully subsisting, unless the Committee on the Bill report that such alteration ought to be allowed, with the Reasons on which their opinion is founded, together with the number of Preference Shareholders who have assented to or dissented from such alteration.

Company not to alter any preference previously granted.

162. No powers of purchasing, hiring, or providing Steam Vessels shall be contained in a Bill by which any other powers are sought to be obtained by a Railway Company, except when the transit by such Steam Vessels is required to connect portions of Railway belonging to or proposed to be constructed by such Company.

No powers of purchasing, etc., Steam vessels in Railway Bills.

163. No powers of purchase, sale, lease or amalgamation shall be given to any Railway Company, with reference to any other undertaking already authorized by any Act or Acts, nor to any other incorporated Company, with reference to any Railway, unless, previously to the application to Parliament for such purpose, the several Companies who may be parties to such purchase, sale, lease or amalgamation shall have proved to the satisfaction of the Board of Trade, that they have respectively paid up one-half of the capital authorized to be raised by any previous Act or Acts by means of Shares, and have expended for the purposes of such Act or Acts a sum equal thereto; and in case such powers shall be applied for in respect of Works intended to be authorized by any Bill or Bills of the same Session, it shall be proved to the satisfaction of the Board of Trade that such Companies have respectively paid up One-half the amount

No powers of purchase, etc., to be given except after proof of certain matters before Board of Trade.

of their capital, and that the Company proposed to be empowered to construct such Works have included in such amount the capital proposed to be authorized by such Bill or Bills; and that no such powers shall be given in respect of Works intended to be authorised by any Act or Acts for which it is intended to apply in any subsequent Session.

Railway Company not to guarantee interest or dividend before completion of line.

164. No Railway Company shall be authorized, except for the execution of its original Line or Lines sanctioned by Act of Parliament, to guarantee interest on any shares which it may issue for creating additional Capital, or to guarantee any rent or dividend to any other Railway Company, until such first-mentioned Company shall have completed and opened for traffic such original Lines.

Limitation of Capital on Amalgamation of Companies.

165. In Bills for the Amalgamation of Railway Companies, the amount of Capital created by such Amalgamation shall in no case exceed the sum of the Capitals of the Companies so amalgamated.

Limit to additional Capital of purchasing Company.

166. In Bills for empowering any Railway Company to purchase any other Railway, no addition shall be authorized to be made to the Capital of the purchasing Company, beyond the Amount of the Capital of the Railway purchased; and in case such Railway shall be purchased at a premium, no addition on account of such premium shall be made to the Capital of the purchasing Company.

Application of provisions of the Railway and Canal Traffic Act, 1888, to the revision of rates.

166a. In the case of every Bill for incorporating a Railway, Canal, or Tramroad Company, or for giving any powers to an existing Railway, Canal or Tramroad Company to which no Rates and Charges Order Confirmation Act expressly applies, the Committee on the Bill shall fix the Rates and Charges for merchandise traffic (including small parcels of a perishable nature conveyed by passenger train exceeding 56 lbs in weight) by reference to the Rates and Charges Order Confirmation Act of some other Company which, in the opinion of the Committee, will properly and conveniently apply; and the Committee shall, in the case of an existing Company, provide that the Rates and Charges for merchandise traffic, and such small parcels as aforesaid so fixed, shall be in substitution for the Rates and Charges for similar traffic authorized to be taken by the Company under their existing Acts.

If in any such Bill other than a Railway Bill the Committee shall be of opinion that no such Act as aforesaid will properly and conveniently apply, they shall insert a Clause to the following effect:—

Section 24 of 'The Railway and Canal Traffic Act, 1888,' and any enactment which may be passed in the present or any future Session of Parliament extending or modifying that enactment shall, with any necessary modifications, apply to the Company in all respects as if it were one of the Companies to which the provisions of the said enactment in terms applied. Provided that the time within which the revised schedule of maximum rates and charges prescribed by the said section shall be submitted to the Board of Trade shall be three years from the date of the passing of this Act, or such further time as the Board of Trade may permit.

167. A Clause shall be inserted in every Railway Bill prohibiting the payment of any Interest or Dividend to any Shareholder on the amount of the Calls made in respect of the Shares held by him, except such interest or money advanced by any Shareholder beyond the amount of the Calls actually made as is in conformity with the Companies Clauses Consolidation Act, 1845, or the Companies Clauses Consolidation (Scotland) Acts, 1845, as the case may be; and except such interest (if any) as the Committee on the Bill may, according to the circumstances of the case, think fit to allow, subject always to the following conditions:—

Clause that no Interest or dividend be paid on Calls.

- (1) That the rate of interest allowed by the Committee do not in any case exceed three per centum per annum;
- (2) That interest be allowed to be paid in respect only of the time allowed by the Bill for the completion of the railway, or such less time as the Committee think fit;
- (3) That payment of interest be not allowed to begin until the Railway Company have deposited with the Board of Trade a statutory declaration by two of the directors and the Secretary of the Company to the effect that two-thirds at least of the share capital authorized by the Bill, in respect whereof interest may be paid, have been actually issued and accepted, and are held by shareholders, who, or whose executors, administrators, successors, or assigns, are legally liable for the same;
- (4) That interest do not accrue in favour of any shareholder for any time during which any call on any of his shares is in arrear;
- (5) That the aggregate amount to be so paid for interest be estimated and stated in the Bill, and be not deemed capital within Standing Order 153;
- (6) That notice of the Company having power so to pay interest be given in every prospectus, advertisement, or other document of the Company inviting subscriptions for shares, and in every certificate of shares; and
- (7) That the half-yearly accounts of the Company do show the amount on which, and the rate at which, interest has been paid;

and the Company may be authorized by the Bill to pay interest accordingly, but not further or otherwise, and the Committee on the Bill shall report to the House whether or not they have allowed such interest.

168. A Clause shall be inserted in every Railway Bill, by which any money is authorized to be raised, prohibiting the Company from paying, out of such money, the Deposits required by the Standing Orders to be made for the purposes of any application to Parliament for a Bill for the construction of another Railway.

Clause as to Deposits not to be paid out of Capital.

168a. The foregoing Orders, No. 145a and Nos. 158 to 168, inclusive, shall apply, *mutatis mutandis*, to Subways, Subway Companies, and Subway Bills, and to Tramroads, Tramroad Companies, and Tramroad Bills.

Application of Standing Orders 145a and 158 to 168 inclusive.

APPENDIX F.

CLAUSES RELATING TO CAPITALIZATION, ETC., IN
MODEL BILL REFERRED TO IN MEMORANDUM
OF MR. VESEY KNOX, K.C.

RAILWAY BILL.

CAPITAL AND BORROWING.

Capital.

8. The capital of the Company shall be

pounds in

shares of ten pounds each.

Issue of shares.

9. The Company shall not issue any share created under the authority of this Act nor shall any such share vest in the person accepting the same unless and until a sum not being less than one-fifth of the amount of such share is paid in respect thereof.

Calls.

10. One-fifth of the amount of a share shall be the greatest amount of a call and months at least shall be the interval between successive calls and of the amount of a share shall be the utmost aggregate amount of the calls made in any year upon any share.

Receipt in case
of persons not
sui juris.

11. If any money is payable to a shareholder or mortgagee or debenture stock holder being a minor, idiot or lunatic the receipt of the guardian or committee of his estate shall be a sufficient discharge to the Company.

(Here insert every special or other provision affecting the share capital of the company; and if shares are to be taken by another company, the clause allowing this should be here inserted, but the provisions for enabling the other company to raise money for that purpose must appear in a subsequent part of the Bill. See Special Clauses, p. 26.)

Power to borrow.

12. The Company may borrow on mortgage of the undertaking any sum not exceeding in the whole pounds but no part thereof shall be borrowed until the whole capital of

pounds is issued and accepted and one-half thereof is paid up, and the Company have proved to the justice who is to certify under the fortieth section of the Companies Clauses Consolidation Act, 1845, before he so certifies that the whole of such capital has been issued and accepted and that one-half thereof has been paid up, and that not less than one-fifth part of the amount of each separate share in such capital has been paid on account thereof before or at the time of the issue or acceptance thereof, and that such capital was issued *bona fide* and is held by the persons to whom the same was issued, or their executors, administrators, successors or assigns, and that such persons, their executors, administrators, successors or assigns are legally liable for the same; and upon production to such justice of the books of the

company and of such other evidence as he shall think sufficient, he shall grant a certificate that the proof aforesaid has been given, which shall be sufficient evidence thereof.

13. The mortgagees of the undertaking may enforce payment of arrears of interest or principal or principal and interest due on their mortgages by the appointment of a receiver. In order to authorise the appointment of a receiver in respect of arrears of principal the amount owing to the mortgagees by whom the application for a receiver is made shall not be less than _____ pounds in the whole.

Appointment of receiver.

(About one-tenth of the sum to be borrowed is the usual amount to be here inserted but not exceeding £10,000.)

(When further borrowing powers are given to an existing company, all powers under previous Acts for the appointment of a receiver are to be repealed [without prejudice to any appointment theretofore made or proceedings then pending], and the above clause is to be substituted.)

14. The Company may create and issue debenture stock subject to the provisions of Part III of the Companies Clauses Act, 1863, but notwithstanding anything therein contained the interest of all debenture stock and of all mortgages at any time (after the passing of this Act) created and issued or granted by the Company under (any previous Act or) this (Act) or any subsequent Act shall, subject to the provisions of any subsequent Act, rank *pari passu* (without respect to the dates of the securities or of the Acts of Parliament or resolutions by which the stock and mortgages were authorized), and shall have priority over all principal moneys secured by such mortgages. Notice of the effect of this enactment shall be endorsed on all mortgages and certificates of debenture stock.

Debenture stock.

(This clause is to be inserted in the case of all new companies, and of all existing companies, which have not issued debenture stock. In the latter case the words 'after the passing of this Act' must be inserted if there is any mortgage debt.)

(In the case of existing companies which have already adopted the model debenture stock clause the following may be used.)

14a. The Company may create and issue debenture stock subject to the provisions of Section _____ of the Act of _____. Notice of the effect of that enactment shall be endorsed on all mortgages and certificates of debenture stock.

Debenture stock.

(Here insert all special provisions (if any) affecting the borrowing powers of the company.)

15. All moneys raised under this Act whether by shares (debenture stock) or borrowing shall be applied only to the purposes of this Act to which capital is properly applicable.

Application of moneys.

COMPLETION OF WORKS.

34. If the railway is not completed within *five* years from the passing of this Act, then on the expiration of that period the powers by this Act granted to the Company for making and completing the railway or otherwise in relation thereto shall cease except as to so much thereof as is then completed.

Period for completion of works.

DEPOSIT OR PENALTY.

Deposit money
not to be repaid
except so far as
railway is
opened. (*New
Railways.*)

35. Whereas pursuant to the Standing Orders of both Houses of Parliament and to the Parliamentary Deposits Act 1846 a sum of

(stock, Exchequer bills) being five per cent upon the amount

of the estimate in respect of the railway has been deposited with (transferred into the name of) the Paymaster General for and on behalf of the Supreme Court (Accountant General of the Supreme Court in Ireland) in respect of the application to Parliament for this Act which sum (stock Exchequer bills) is (are) referred to in this Act as the deposit fund: Be it enacted that notwithstanding anything contained in the said Act the said deposit fund shall not be paid or transferred to or on the application of the person or persons or the majority of the persons named in the warrant or order issued in pursuance of the said Act or the survivors or survivor of them (which persons survivors or survivor are or is in this Act referred to as 'the depositors') unless the Company shall previously to the expiration of the period limited by this Act for completion of the railway open the same for the public conveyance of passengers, and if the Company shall make default in so opening the railway the deposit fund shall be applicable and shall be applied as provided by the next following section: Provided that if within such period as aforesaid the Company open any portion of a railway for the public conveyance of passengers, then on the production of a certificate of the Board of Trade specifying the length of the portion of the railway opened as aforesaid and the portion of the deposit fund which bears to the whole of the deposit fund the same proportion as the length of the railway so opened bears to the entire length of the railway, the High Court shall on the application of the depositors order the portion of the deposit fund specified in the certificate to be paid or transferred to them or as they shall direct, and the certificate of the Board of Trade shall be sufficient evidence of the facts therein certified and it shall not be necessary to produce any certificate of this Act having passed anything in the above-mentioned Act to the contrary notwithstanding.

Application of
deposit.

36. If the Company do not previously to the expiration of the period limited for the completion of the railway complete the same and open it for the public conveyance of passengers, then and in every such case the deposit fund or so much thereof as shall not have been paid to the depositors shall be applicable and after due notice in the *London Gazette* shall be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement construction or abandonment of the railway or any portion thereof, or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the Company by this Act and for which injury or loss no compensation or inadequate compensation has been paid, and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the High Court may seem fit, and if no such compensation is payable or if a portion of the deposit fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit fund or such portion thereof as may not be required as aforesaid shall, if a receiver has been appointed or

the Company is insolvent or the undertaking has been abandoned, be paid or transferred to such receiver or be applied in the discretion of the Court as part of the assets of the Company for the benefit of the creditors thereof, and subject to such application shall be repaid (retransferred) to the depositors: Provided that until the deposit fund has been repaid (retransferred) to the depositors or has become otherwise applicable as hereinbefore mentioned any interest or dividends accruing thereon shall from time to time and as often as the same shall become payable, be paid to or on the application of the depositors.

(Substitute for last two preceding clauses in case of new lines of existing companies. [1])

35a. If the Company fail within the period limited by this Act to complete the railway, the Company shall be liable to a penalty of fifty pounds a day for every day after the expiration of the period so limited until the railway is completed and opened for the public conveyance of passengers or until the sum received in respect of such penalty amounts to five per cent on the estimated cost of the works, and the said penalty may be applied for by any land-owner or other person claiming to be compensated or interested in accordance with the provisions of the next following section of this Act and in the same manner as the penalty provided in Section 3 of the Railway and Canal Traffic Act 1854, and every sum of money recovered by way of such penalty as aforesaid shall be paid under the warrant or order of such court or judge as is specified in that section to an account opened or to be opened in the name of the Paymaster General for and on behalf of the Supreme Court (the Accountant General of the Supreme Court in Ireland) in the bank (and to the credit) specified in such warrant or order, and shall not be paid thereout except as hereinafter provided; but no penalty shall accrue in respect of any time during which it shall appear by a certificate to be obtained from the Board of Trade that the Company was prevented from completing or opening such line by unforeseen accident or circumstances beyond their control: provided that the want of sufficient funds shall not be held to be a circumstance beyond their control.

Penalty imposed unless the line is opened within the time limited.

¹The two following clauses are to be inserted in every Railway Bill whereby the construction of any new line of railway is authorized, or the time for completing any line already authorized is extended, promoted by an existing railway company which is possessed of a railway already opened for public traffic, and which has during the year last past paid dividends on its ordinary share capital, and which does not propose to raise under the Bill a capital greater than its existing authorized capital.

36a. Every sum of money so recovered by way of penalty as aforesaid shall be applicable and after due notice in the *London Gazette* shall be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction or abandonment of the railway or any portion thereof or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the Company by this Act, and for which injury or loss no compensation or inadequate compensation has been paid, and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the High Court may seem fit; and if no such compensation is pay-

Application of penalty.

able or if a portion of the sum or sums of money so recovered by way of penalty as aforesaid has been found sufficient to satisfy all just claims in respect of such compensation, then the said sum or sums of money recovered by way of penalty or such portion thereof as may not be required as aforesaid shall, if a receiver has been appointed or the Company is insolvent or the railway or railways in respect of which the penalty has been incurred or any part thereof has been abandoned, be paid or transferred to such receiver or be applied in the discretion of the Court as part of the assets of the Company for the benefit of the creditors thereof and subject to such application shall be repaid or retransferred to the Company.

RATES, CHARGES AND FARES.

Tolls.

37. The Company may demand and take for the use of the railway by any other company or person with engines and carriages such reasonable tolls as they think fit.

Rates for merchandise.

38. The classification of merchandise traffic including perishable merchandise by passenger train and the Schedule of maximum rates and charges applicable thereto and the regulations and provisions contained in the Schedule to 'The Railway Rates and Charges (No.), Order 189' (which Order is scheduled to and confirmed by 'The Railway Rates and Charges (No.), Order Confirmation Act 189' shall be applicable and apply to the Company as if it were one of the railway companies named in the [appendix to the Schedule to the] Order confirmed by the said Act, Provided that in respect of the conveyance of a consignment of perishable merchandise not exceeding 56 pounds in weight by passenger train, the Company shall not be entitled to charge a higher rate than the maximum rate which they are authorized to charge for the conveyance of parcels of the same weight.

Charges for small parcels.

39. For the conveyance on the railway of small parcels not exceeding five hundred pounds in weight by passenger trains the Company may demand and take any charges not exceeding the following (that is to say):—

- For any parcel not exceeding seven pounds in weight threepence;
- For any parcel exceeding seven pounds but not exceeding fourteen pounds in weight fivepence;
- For any parcel exceeding fourteen pounds but not exceeding twenty-eight pounds in weight sevenpence;
- For any parcel exceeding twenty-eight pounds but not exceeding fifty-six pounds in weight ninepence;
- And for any parcel exceeding fifty-six pounds but not exceeding five hundred pounds in weight the Company may demand any sum they think fit;

Provided always that articles sent in large aggregate quantities although made up in separate parcels such as bags of sugar, coffee, meal and the like shall not be deemed small parcels but that term shall apply only to single parcels in separate packages.

Maximum fares for passengers.

40. The maximum fares to be charged by the Company for the conveyance of passengers upon the railway including every expense

incidental to such conveyance shall not exceed the following (that is to say):—

For every passenger conveyed in a first-class carriage threepence per mile;

For every passenger conveyed in a second class carriage twopence per mile;

For every passenger conveyed in a third-class carriage one penny per mile;

For every passenger conveyed on the railway for a less distance than three miles the Company may charge as for three miles, and every fraction of a mile beyond three miles or any greater number of miles shall be deemed a mile.

41. Every passenger travelling upon the railway may take with him his ordinary luggage not exceeding one hundred and fifty pounds in weight for first-class passengers, one hundred and twenty pounds in weight for second-class passengers, and one hundred pounds in weight for third-class passengers without any charge being made for the carriage thereof. Passengers' luggage.

42. The restrictions as to the charges to be made for passengers shall not extend to any special train run upon the railway in respect of which the Company may make such charges as they think fit, but shall apply only to the ordinary and express trains appointed from time to time by the Company for the conveyance of passengers upon the railway. Foregoing charges not to apply to special trains.

INTEREST OUT OF CAPITAL, &C.

46. No interest shall be paid out of any share or loan capital which the company are by this or any other Act authorized to raise to any shareholder on the amount of the calls made in respect of the shares held by him; but nothing in this Act shall prevent the Company from paying to any shareholder such interest on money advanced by him beyond the amount of the calls actually made as is in conformity with the Companies Clauses Consolidation Act, 1845. Interest not to be paid out of capital.

(Alternative Clause allowed in case of new companies.)

47. Notwithstanding anything in this Act or in any Act or Acts incorporated herewith the Company may out of any money by this Act authorized to be raised pay interest at such rate not exceeding four pounds per centum per annum as the directors may determine to any shareholder on the amount from time to time paid up on the shares held by him from the respective times of such payments until the expiration of the time limited by this Act for the completion of the works by this Act authorized or such less period as the directors may determine, but subject always to the conditions hereinafter stated (that is to say):— Power to pay interest out of capital during construction.

(a) No such interest shall begin to accrue until the Company shall have deposited with the Board of Trade a statutory declaration by two of the directors and the Secretary of the Company that two thirds at least of the share capital authorized by this Act in respect of which such interest may be paid has been actually issued and accepted and

is held by shareholders who or whose executors, administrators or assigns are legally liable for the same.

- (b) No such interest shall accrue in favour of any shareholder for any time during which any call on any of his shares is in arrear;
- (c) The aggregate amount to be so paid for interest shall not exceed pounds and the amount so paid shall not be deemed share capital in respect of which the borrowing powers of the Company may be exercised, but such borrowing powers shall be reduced to the extent of one-third of the amount paid for interest as aforesaid;
- (d) Notice that the Company has power so to pay interest out of capital shall be given in every prospectus, advertisement or other document of the company inviting subscriptions for shares and in every certificate of shares;
- (e) The half-yearly accounts of the Company shall show the amount of capital on which and the rate at which interest has been paid in pursuance of this section.

Save as hereinbefore set forth no interest shall be paid out of any share or loan capital which the Company are by this or any other Act authorized to raise, to any shareholder on the amount of the calls made in respect of the shares held by him, but nothing in this Act shall prevent the Company from paying to any shareholder such interest on money advanced by him beyond the amount of the calls actually made as is in conformity with the Companies Clauses Consolidation Act, 1845.

Deposits for future Bills not to be paid out of capital.

48. The Company shall not out of any money by this Act authorized to be raised pay or deposit any sum which by any Standing Order of either House of Parliament now or hereafter in force may be required to be deposited in respect of any application to Parliament for the purpose of obtaining an Act authorizing the Company to construct any other railway or to execute any other work or undertaking.

SPECIAL CLAUSES IN RAILWAY BILLS.

1. *Division of Shares into Preferred and Deferred Half Shares.*

Power to divide shares.

1. Subject to the provisions of this Act the Company with the authority of three fourths of the votes of the shareholders present in person or by proxy at a general meeting of the Company specially convened for the purpose may divide any shares in their capital into half shares of which one shall be called 'preferred half share' and the other shall be called 'deferred half share;' but the Company shall not divide any share under the authority of this Act unless and until not less than sixty per centum upon such share has been paid up and upon every such division fifty per centum upon the entire share shall be carried to the credit of the deferred half share (being the whole amount payable thereon) and the residue to the credit of the preferred half share.

Dividends on half shares.

2. The dividends which would be payable on any divided share if the same had continued an entire share shall be applied in pay-

ment of dividends on the two half shares in manner following (that is to say) first in payment of dividend after such rate not exceeding per centum per annum as shall be determined once for all at a general meeting of the Company specially convened for the purpose, on the amount for the time being paid up on the preferred half share, and the remainder if any in payment of dividend on the deferred half share, and the Company shall not pay any greater amount of dividend on the two half shares than would have been payable on the entire share if the same had not been divided.

3. Each preferred half share shall be entitled out of the profits of each year to the dividend which may have been attached to it by the Company as aforesaid in priority to the deferred half share bearing the same number; but if in any year ending the thirty-first day of December there shall not be profits available for the payment of the full amount of dividend on any preferred half share for that year, no part of the deficiency shall be made good out of the profits of any subsequent year or out of any other funds of the Company.

Dividend on preferred half shares to be paid out of profits of year only.

4. Forthwith after the creation of any half shares the same shall be registered by the directors, and each half share shall bear the same number as the number of the entire share certificate in respect of which it was issued, and the directors shall issue certificates of the half shares accordingly, and shall cause an entry to be made in the register of the entire shares of the conversion thereof; but the directors shall not be bound to issue a certificate of any half share until the certificate of the existing entire share be delivered to them to be cancelled unless it be shown to their satisfaction that such certificate is destroyed or lost, and on any certificate being so delivered up the directors shall cancel it.

Half shares to be registered and certificates issued.

5. The terms and conditions on which any preferred half share or deferred half share created under this Act is issued shall be stated on the certificate of each such half share.

Terms of issue to be stated in certificates.

6. The provisions of the Companies Clauses Consolidation Act 1845 with respect to the forfeiture of shares for non-payment of calls shall apply to all preferred half shares created under the authority of this Act, and every such preferred half share shall for that purpose be considered an entire share distinct from the corresponding deferred half share; and until any forfeited preferred half share shall be sold by the directors all dividends which would be payable thereon if the same had not been forfeited shall be applied in or towards payment of any expenses attending the declaration of forfeiture thereof and of the arrears of calls for the time being due thereon with interest.

Forfeiture of preferred half shares.

7. No preferred half share created under the authority of this Act shall be cancelled or be surrendered to the Company.

Preferred half shares not to be cancelled or surrendered.

8. The several half shares under this Act shall be half shares in the capital of the Company and every two half shares (whether preferred or deferred or one of each) held by the same person shall confer such right of voting at meetings of the Company and (subject to the provisions hereinbefore contained) shall confer and have all such other rights, qualifications, privileges, liabilities and incidents as attach and are incident to an entire share.

Half shares to be half shares in capital.

2. Power to another Company to Subscribe to the Undertaking and to raise Money for that Purpose.

Power to Company to subscribe and to apply funds for that purpose.

1. The Middlesex Railway Company may, with the authority of three-fourths of the votes of their shareholders present in person or by proxy at a general meeting of the said Company specially convened for the purpose, subscribe such moneys as they may think fit towards the undertaking not exceeding in the whole pounds; and the said Company may with the like authority contribute and apply in or towards payment of their said subscription any moneys which they are already authorized to raise and which may not be required by them for the purposes of their undertaking, and also any moneys which they are by this Act authorized to raise, and the said Company shall in respect of the sums to be subscribed and the corresponding shares in the Company to be held by them have all the powers, rights and privileges (except in regard to voting at general meetings which shall be as hereinafter provided) and be subject to all the obligations and liabilities of proprietors of shares in the Company: Provided always that the Middlesex Company shall not sell, dispose of or transfer any of the shares in the Company for which they may subscribe.

(The above clause should be inserted immediately before the borrowing powers. The following clauses should be inserted in the latter part of the Bill immediately before the saving clauses (if any) or Standing Order clauses.)

(Borrowing powers will not be allowed for the purposes of contribution.)

Power to raise money by the creation of shares or stock.

2. The Middlesex Company may raise for the purposes of their subscription to the undertaking any capital not exceeding in nominal amount pounds by the issue at their option of new ordinary shares or stock or new preference shares or stock or wholly or partially by any one or more of those modes respectively; and the clauses and provisions of the Companies Clauses Consolidation Act 1845 with respect to the following matters (that is to say) :—

- The distribution of the capital of the Company into shares;
- The transfer or transmission of shares;
- The payment of subscriptions and the means of enforcing the payment of calls;
- The forfeiture of shares for non-payment of calls;
- The remedies of creditors of the Company against the shareholders;
- The consolidation of the shares into stock;
- The general meetings of the Company and the exercise of the right of voting by the shareholders;
- The making of dividends;
- The giving of notices; and
- The provision to be made for affording access to the special Act by all parties interested,

and part I (relating to cancellation and surrender of shares) and part II (relating to additional capital) of the Companies Clauses Act, 1863, shall extend and apply to the Middlesex Company and to the additional capital which they are by this Act authorized to raise.

(This clause will require modification in all cases where the provisions of the special Acts of the subscribing company differ from those of the general Act.)

Shares not to be issued until one-fifth paid up.

3. The Middlesex Company shall not issue any share under the authority of this Act of less nominal value than ten pounds nor

shall any share vest in the person or corporation accepting the same, unless and until a sum not being less than one-fifth of the amount of such share shall have been paid in respect thereof.

4. All moneys which the Middlesex Company may raise under the powers of this Act shall be applied for the purposes of the before-mentioned subscription only. Application of moneys raised by the Company.

5. The Middlesex Company, whilst shareholders of the Company, may by writing under their common seal from time to time appoint some person to attend any meeting of the company and such person shall have all the privileges and powers attaching to a shareholder of the Company at such meetings and may vote thereat in respect of the capital held by the Middlesex Company. Votes of Middlesex Company at general meetings.

3. *Debenture Stock.*

(Where Clause 14, page 4, has been already adopted in an existing Act.)

1. The Company may create and issue debenture stock subject to the provisions of Part III of the Companies Clauses Act, 1863, and of Section of the Act, 18 , (the Act by which the debenture stock is originally authorized). Debenture stock.

2. The principal moneys secured by all mortgages granted by the Company in pursuance of the powers of any Act of Parliament before the passing of this Act, and subsisting at the passing hereof, shall during the continuance of such mortgages have priority over the principal moneys secured by any mortgages granted by virtue of this Act. Priority of principal moneys secured by existing mortgages.

(The following older form gives priority to both principal and interest in the case of mortgages.)

2a. All mortgages (and bonds) granted by the Company in pursuance of the powers of any Act of Parliament before the passing of this Act and subsisting at the passing hereof shall during the continuance of such mortgages (and bonds), and subject to the provisions of the Acts under which such mortgages (and bonds) were respectively granted, have priority over any mortgages granted by virtue of this Act; but nothing in this section contained shall affect any priority of the interest of any debenture stock at any time created and issued by the Company. Existing mortgages to have priority.

4. *Power to Raise Additional Capital.*

1. The Company may, subject to the provisions of Part II of the Companies Clauses Act, 1863, raise any additional capital not exceeding in the whole pounds nominal capital by the issue at their option of new ordinary shares or stock or new preference shares or stock or wholly or partially by any one or more of those modes respectively; but the Company shall not issue any share of less nominal value than *ten* pounds nor shall any share vest in the person accepting the same unless and until a sum not being less than one-fifth of the amount of such share shall have been paid in respect thereof. Power to raise additional capital.

2. (Except as by this Act otherwise provided) the capital in new shares or stock created by the Company under this Act and the new shares or stock therein and the holders thereof respectively shall be subject and entitled to the same powers, provisions, liabilities, rights, New shares or stock to be subject to the same incidents as other shares or stock.

privileges and incidents whatsoever in all respects as if that capital were part of the now existing capital of the Company of the same class or description and the new shares or stock were shares or stock in that capital.

New shares or stock to form part of capital of company.

Dividends on new shares or stock.

3. The capital in new shares or stock so created shall form part of the capital of the Company.

4. Every person who becomes entitled to new shares or stock shall, in respect of the same, be a holder of shares or stock in the Company and shall be entitled to a dividend with the other holders of shares or stock of the same class or description proportioned to the whole amount from time to time called up and paid on such new shares or to the whole amount of such stock as the case may be.

Restriction as to votes in respect of preferential shares or stock.

5. Except as otherwise expressly provided by the resolution creating the same no person shall be entitled to vote in respect of any new shares or stock to which a preferential dividend shall be assigned.

New and existing shares or stock may be of same class.

6. Subject to the provisions of any Act already passed by which the Company are authorized to raise capital by new shares or stock and to the provisions of this Act, (and any other Act passed in the present Session of Parliament whether before or after the passing of this Act by which the Company may be authorized to raise capital by new shares or stock), the Company may if they think fit raise by the creation and issue of new shares or stock of one and the same class all or any part of the aggregate capital which they are by such other Act and this Act respectively authorized to raise by the creation and issue of new shares or stock.

Power to borrow.

7. The Company may in respect of the additional capital of pounds which they are by this Act authorized to raise, borrow on mortgage of the undertaking any moneys not exceeding in the whole pounds; but no part thereof shall be borrowed until shares for so much of the said additional capital as is to be raised by means of shares are issued and accepted and one-half of such capital is paid up, and the Company have proved to the justice who is to certify under the fortieth section of the Companies Clauses Consolidation Act, 1845, before he so certifies, that shares for the whole of such capital have been issued and accepted, and that one-half of such capital has been paid up, and that not less than one-fifth part of the amount of each separate share in such capital has been paid on account thereof before or at the time of the issue or acceptance thereof, and until stock for one-half of so much of the said additional capital as is to be raised by means of stock is fully paid up and the Company have proved to such justice as aforesaid before he so certifies that such shares or stock, as the case may be, were issued and accepted (and to the extent aforesaid paid up) *bona fide*, and are held by the persons to whom the same were issued or their executors, administrators, successors or assigns, and also so far as the said additional capital is raised by shares that such persons or their executors, administrators, successors or assigns are legally liable for the same, and upon production to such justice of the books of the Company and of such other evidence as he shall think sufficient he shall grant a certificate that the proof aforesaid has been given, which certificate shall be sufficient evidence thereof.

TRAMWAY BILL.

FARES, RATES, AND CHARGES.

33. The Company may demand and take for every passenger travelling upon the tramway or any part or parts thereof including every expense incidental to such conveyance a fare not exceeding one penny per mile; and in computing the said fare the fraction of a mile shall be deemed a mile, but in no case shall the Company be bound to charge a less sum than one penny.

Passengers' fares.

34. Every passenger travelling upon the tramway may take with him his personal luggage not exceeding twenty-eight pounds in weight without any charge being made for the carriage thereof, all such luggage to be carried by hand and not to occupy any part of a seat nor to be of a form or description to annoy or inconvenience other passengers.

Passengers' luggage.

35. The Company shall not be bound unless they think fit to carry passengers' luggage exceeding pounds in weight nor any parcel or goods. (1)

Company not bound to carry goods.

36. Goods, animals, articles or things (other than passengers and passengers' luggage and parcels not exceeding fifty-six pounds in weight) shall not be conveyed on the tramway between the hours of eight in the morning and eight in the evening without the consent of the local authority and the road authority.

Goods traffic confined to certain hours.

If the Company is not to be authorized to take rates and charges for animals and goods the following clause is to be inserted:—

37. The Company shall not carry on the tramways any goods, animals or other things other than passengers and passengers' luggage not exceeding the weight in this Act in that behalf mentioned and small parcels.

Company not to carry animals and goods.

38. The Company shall not take or demand on Sunday or any public holiday any higher fares or charges than those levied by them on ordinary week days.

As to fares on Sundays or holidays.

39. (1) The Company at all times after the opening of the tramways for public traffic shall and they are hereby required to run a proper and sufficient service of carriages for artisans, mechanics and daily labourers each way every morning and every evening (Sundays, Christmas Day and Good Friday always excepted), at such hours not being later than eight in the morning or earlier than five in the evening respectively as may be most convenient for such workmen going to and returning from their work, at fares not exceeding one half penny for every mile or fraction of that distance. On Saturdays the Company in lieu of running such carriages after five o'clock in the evening shall run the same at such hours between noon and two o'clock in the afternoon as may be most convenient for the said purposes.

Cheap fares for labouring classes.

(2) If complaint is made to the Board of Trade that such proper and sufficient service is not provided, the Board after considering

(1) Where animals and goods are intended to be carried a clause should be inserted fixing the maximum rates for such carriage (see, for instance, Nottinghamshire, &c., Act, 1903, c. 202, s. 49).

the circumstances of the locality may by order direct the Company to provide such service as may appear to the Board to be reasonable.

(3) The Company shall be liable to a penalty not exceeding five pounds for every day during which they fail to comply with any order under this section.

Periodical revision of rates and charges.

40. If at any time after three years from the opening for public traffic of the tramways or any portion thereof or after three years from the date of any order made in pursuance of this section in respect of the tramways or any portion thereof it is represented in writing to the Board of Trade by the local authority of any district in which the tramways or such portion are or is wholly or partly situate or by twenty inhabitant ratepayers of that district or by the Company that under the circumstances then existing all or any of the fares or other charges demanded and taken in respect of the traffic on the tramways or on such portion should be revised, the Board of Trade may (if they think fit) direct an inquiry by a referee to be appointed by the said Board in accordance with the provisions of the Tramways Act 1870; and if the referee reports that it has been proved to his satisfaction that all or any of the fares or charges should be revised, the said Board may subject to the maximum fares and charges authorized by this Act by order in writing alter, modify, reduce or increase all or any of the fares or charges to be taken in respect of the tramways or on any portion thereof and thenceforth such order shall be observed until the same is revoked or modified by an order of the Board of Trade made in pursuance of this section: Provided that a copy of this section shall be annexed to every table or list of fares published or exhibited by the Company.

(Here insert clauses for Capital, &c.: see p. 3 *et seq.*; but the following clauses are necessary in Tramway Bills.)

Company not to create debenture stock.

46. The Company shall not create debenture stock.

Rights of mortgagees on sale of tramway.

47. Every mortgage of the Company's undertaking shall be deemed to comprise all purchase money which may be paid to the Company in the event of a sale to the local authority under Section 43 of the Tramways Act 1870, and may comprise all or any moneys carried to the contingency fund according to the terms of the mortgage; and every mortgage deed shall be endorsed with notice that the mortgage will not be a charge upon the tramways or the tramway undertaking in the event of such sale.

(Here insert clauses as to capital, issue of shares, and calls; see p. 3.)

GAS BILL.

Power to Company to raise additional capital.

6. (2) The Company may from time to time raise additional capital not exceeding in the whole pounds by the creation and issue of new ordinary shares or stock or new preference shares or stock, or wholly or partially by one or more of those modes respectively, but the Company shall not issue any share of less nominal value than ten pounds: Provided that it shall not be lawful for the Company to create and issue under the powers of this Act any greater nominal amount of capital than shall be sufficient to produce including any premium which may be obtained on the sale thereof the sum of pounds: Provided also that the Company shall not create

(2) Applicable only to existing companies

and issue within the year following the passing of this Act any greater nominal amount of capital than shall be sufficient to produce in manner aforesaid pounds, or within any subsequent year pounds: Provided also that the Company shall not raise by the issue of preference shares or stock a greater amount of such additional capital than pounds.

7. If in any year or years the Company have not created and issued capital to the full amount hereinbefore prescribed in relation to such year or years, they may in any subsequent year create and issue in addition to the amount prescribed for such year such a nominal amount of capital as shall be sufficient together with the amount then raised to produce in manner aforesaid pounds in respect of the year following the passing of this Act, and pounds in respect of every subsequent year then expired.

If authorized capital for any year not raised amount may be made up in subsequent years.

8. The Company may subject to the provisions of this Act borrow on mortgage of the undertaking any sum or sums not exceeding in the whole *one-third* part of the amount of the (additional) capital which at the time of borrowing has been raised under the powers of this Act. But no sum shall be borrowed in respect of any capital so raised until the Company have proved to a Justice of the Peace before he gives his certificate under the fortieth section of the Companies Clauses Consolidation Act 1845 that the whole of the stock or shares at the time issued together with the premium (if any) realised on the sale thereof have been fully paid up.

Power to borrow.

9. All moneys raised under this Act *including premiums* shall be applied only to purposes to which capital is properly applicable, and any sum of money which may arise by way of premium from the issue of shares *or stock* under the provisions of this Act shall not be considered as part of the capital of the Undertakers entitled to dividend.

Application of money.

(Then insert the clauses—Priority of money already borrowed on mortgage [p. 28], debenture stock clauses [p. 27], and clauses as to general meetings, and directors [p. 5].)

LIMITATION OF PROFITS.

10. Except as by this Act provided the profits of the Company to be divided among the shareholders in any year shall not exceed the following rates (which are in this Act referred to as the standard rates of dividend), that is to say, on the original capital the rate of ten pounds in respect of every one hundred pounds of such capital, and on the additional capital to be raised under the powers of this Act the rate of seven pounds in respect of every one hundred pounds actually paid up of such capital as shall be issued as ordinary capital, and the rate of *five* pounds in respect of every one hundred pounds actually paid up of such capital as shall be issued as preference capital.

Profits of the Company limited. (Standard rates of dividend).

11. In case in any half year the funds of the Company applicable to dividend shall be insufficient to pay the full amount of dividend at the prescribed maximum rate on each class of ordinary stock or shares in the capital of the Company a proportionate reduction shall be made in the dividend of each class.

Dividends on different classes of stock or shares to be paid proportionately.

Power to create a special Purposes Fund.*

12. (1) The Directors of the Company may if they think fit in any year appropriate out of the revenue of the Company as part of the expenditure on revenue account any sum not exceeding an amount equal to one per cent of the paid-up capital of the Company including premiums to a fund to be called the 'Special Purposes Fund.'

(2) The Special Purposes Fund shall be applicable only to meet such charges as a chartered accountant or incorporated accountant being the auditor of the Company or appointed for the purpose by the Board of Trade shall approve as being—

(a) expenses incurred by reason of accidents, strikes or circumstances which due care and management could not have prevented, or

(b) expenses incurred in the replacement or removal of plant or works other than expenses requisite for maintenance and renewal of plant and works.

(3) The maximum amount standing to the credit of the Special Purposes Fund shall not at any time exceed an amount equal to one-tenth part of the paid-up capital of the Company including premiums.

(4) The moneys forming the Special Purposes Fund or any portion thereof may be invested in securities in which trustees are authorized by law to invest or may be applied for the general purposes of the Company to which capital is properly applicable, or may be used partly in the one way or partly in the other.

(5) Resort may from time to time be had to the Special Purposes Fund notwithstanding that the sum standing to the credit of the Fund is for the time being less than the maximum allowed by this section.

(6) († The money or securities standing to the credit of the Insurance Fund of the Company at the passing of this Act shall be credited to the Special Purposes Fund and section of the Act of is hereby repealed.)

Application of excess of profits over authorized rates of dividend.

13. If the clear profits of the undertaking of the Company in any year amount to a larger sum than is sufficient to pay (the dividend on the preference capital and) the dividend at the authorized rate on the ordinary capital of the Company the excess shall be carried to the credit of the divisible profits of such undertaking for the next following year.

Provided that the sum standing to the credit of such divisible profits shall not at any time exceed the amount required to pay one year's *dividend* at the authorized *rate*.

Power to create a reserve fund.

14. Where in any year the dividend of the Company on the ordinary capital of the Company shall exceed the standard rate by reason of the price charged by the Company for gas in such year being below the standard price, then out of the amount of the divisible profits of the Company applicable to the payment of such excess of dividend the Company may in such year set apart such sum as they shall think fit, and all sums (if any) so set apart by the Company, and any reserve or other fund of the Company existing at the passing of this Act, may be invested in Government or other securities, and the dividends and interest arising from such securities

* This clause is not applicable except where there is a sliding scale.

(† Insert where an Insurance Fund already exists and repeal section authorizing creation of that fund.)

may also be invested in the same or the like securities, in order that the same may accumulate at compound interest; and the fund so formed shall be called 'the Reserve Fund,' and shall be applicable to the payment of dividend in any year in which the clear profits of the Company shall be insufficient to enable the Company in such year to pay the dividend at the authorized rate on the ordinary capital of the Company, and save as in this Act provided no sum shall in any year be carried by the Company to any reserve fund.

AUCTION CLAUSE (1)

15. (1) All shares or stock created under the powers of this Act shall be issued in accordance with the provisions of this section. New shares or stock to be sold by auction or tender.

(2) All shares or stock so to be issued shall be offered for sale by public auction or tender in such manner, at such times, and subject to such conditions of sale as the Company shall from time to time determine. Provided as follows:—

- (a) Notice of the intended sale shall be given in writing to the town clerk of _____ and to the Secretary of the London Stock Exchange at least twenty-eight days before the day of auction or the last day for the reception of tenders as the case may be, and shall also be duly advertised once in each of two consecutive weeks in one or more local newspapers circulating within the said borough;
- (b) A reserve price shall be fixed and notice thereof shall be sent by the Company in a sealed letter to be received by the Board of Trade not less than twenty-four hours before, but not to be opened till after, the day of auction or last day for the receipt of tenders as the case may be;
- (c) No lot offered for sale shall comprise shares or stock of greater nominal value than one hundred pounds;
- (d) In the case of a sale by tender no preference shall be given to one of two or more persons tendering the same sum; in the case of a sale by auction a bid shall not be recognized unless it is in advance of the last preceding bid;
- (e) It shall be one of the conditions of sale that the total sum payable by the purchaser shall be paid to the Company within three months after the date of the auction or of the acceptance of the tender as the case may be.

(3) Any shares or stock which have been so offered for sale and are not sold may be offered at the reserve price to the holders of ordinary [(1) and preference] shares or stock of the Company in accordance with the provisions of sections 18, 19, and 20 of the Companies Clauses Act, 1863, and to the employees of the Company, and to the consumers of gas supplied by the Company, in such proportions as the Company may think fit or to one or more of these classes of persons only; provided, in the case of an offer to holders of shares or stock, that if the aggregate amount of shares or stock applied for shall exceed the aggregate amount so offered as aforesaid the same shall be allotted to and distributed amongst the applicants

(1) This clause is also applicable to Bills of water companies.

(1) Omit words in brackets where there are no preference shares or stock.

as nearly as may be in proportion to the amounts applied for by them respectively.

(4) Any shares or stock which have been offered for sale in accordance with subsection (2) or with subsections (2) and (3) and are not sold, shall be again offered for sale by public auction or by tender in accordance with the provisions of this section, and any such shares or stock then remaining unsold may be otherwise disposed of at such price and in such manner as the directors may determine for the purpose of realizing the best price obtainable.

(5) As soon as possible after the conclusion of the sale or sales, the Company shall send a report thereof to the Board of Trade, stating the total amount of the (¹respective) shares or stock sold, the total amount obtained as premium (if any), and the highest and lowest prices obtained for the (¹respective) shares or stock.

APPENDIX "G".

A SUMMARY OF THE LAWS OF THE VARIOUS STATES RESPECTING STOCK AND BOND ISSUES COMPILED BY THE NATIONAL CIVIC FEDERATION.

REGULATION OF STOCK AND BOND ISSUES.

ANALYSIS.

- A. Right to issue stock and create lien a special privilege.
- B. State does not guarantee stocks or bonds.
- C. Authority in general to issue stocks, bonds and other evidences of indebtedness; purposes; application to commission.
- D. Power of commission to authorize issues.
- E. Character of investigation by commission.
- F. Proceedings for obtaining certificate and conditions of its issue:
 - 1. Issues for money only.
 - 2. Issues for other than money.
- G. Limitations on application of acts.
- H. Utilities authorized to issue notes for limited periods without certificate.
- I. Issue of stock or bonds for franchises or property of other public utilities.
- J. Capitalization of reorganized utilities.
- K. Unauthorized issues void.
- L. Application of proceeds of issues.
- M. Duty of utilities to account to commission for disposition of proceeds.
- N. Certificate of authorization required to be recorded.
- O. Contract for consolidation or lease shall not be capitalized.
- P. Franchises not to be capitalized.
- Q. Capital of consolidated corporations.
- R. Manner in which railroads and street railways may increase issues for special purposes designated.
- S. Stock or script dividends.
- T. Sale of stock to stockholders and auction clause.
- U. Penalties for violations of capitalization provisions.

A. RIGHT TO ISSUE STOCK AND CREATE LIEN A SPECIAL PRIVILEGE.

Arizona, California. The power of public utilities¹ to issue stocks and stock certificates and bonds, notes and other evidences of indebtedness and to create liens on their property situated within this state is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as commission may prescribe. *Ariz.—Session Laws 1912, ch. 90, sec. 52(a); Cal.—Stats. 1911, ch. 14, sec. 52(a).*

Wisconsin. The power to create liens on corporate property by public service corporations in this state is a special privilege, the right of supervision, regulation, restriction and control of which shall be vested in the state, and such power shall be exercised according to the provisions of these statutes. *Laws 1911, ch. 593, sec. 1753-2.*

B. STATE DOES NOT GUARANTEE STOCKS OR BONDS.

Arizona, California. No provision of this act and no deed or act done or performed under or in connection therewith shall be held or construed to obligate the State of Arizona (California) to pay or guarantee in any manner whatsoever any stock or stock certificate or bond, note or other evidence of indebtedness authorized issued or executed under the provisions of this act. *Ariz.—Session Laws 1912, ch. 90, sec. 52(g); Cal.—Stats. 1911, ch. 14, sec. 52(g).*

C. AUTHORITY TO ISSUE STOCKS, BONDS AND OTHER EVIDENCES OF INDEBTEDNESS; PURPOSES; APPLICATION TO COMMISSION.

Arizona, California. A public utility¹ may issue stocks and stock certificates, and bonds, notes and other evidences of indebtedness payable at periods of more than 12 months after the date thereof for the following purposes and no others, namely, for the acquisition of property, or for the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service, or for the discharge or lawful refunding of its obligations, or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility¹ not secured by or obtained from the issue of stocks or stock certificates, or bonds, notes or other evidences of indebtedness of such public utility,¹ within five years next prior to the filing of an application with the commission for the required authorization, for any of the aforesaid purposes except maintenance of service and replacements, in cases where the applicant shall have kept its accounts and vouchers for such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made; provided, that such public utility,¹ in addition to the other requirements of law, shall first have secured from the commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labour to be procured or paid for by such issue is reasonably required for the purpose or purposes specified in the order, and that, except as otherwise permitted in the order in the case of bonds, notes or other evidences of indebted-

¹ "Public service corporation," in Arizona.

ness, such purpose or purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income. *Ariz.—Session Laws 1912, ch. 90, sec. 52(b); Cal.—Stats. 1911, ch. 14, sec. 52(b).*

Georgia. Each of the companies or corporations over which the authority of commission is extended by law shall be required to furnish said commission a list of any stocks and bonds, the issuance of which is contemplated and it shall be unlawful for any of said companies or corporations to issue stocks, bonds, notes, or other evidences of debt, payable more than 12 months after the date thereof, except upon the approval of said commission, and then only when necessary and for such amount as may be reasonably required for the acquisition of property, the construction and equipment of power plants, car-sheds and the completion, extension, or improvements of its facilities or properties, or for the improvement or maintenance of its service, or for the discharge or lawful refunding of its obligations or for lawful corporate purposes falling within the spirit of this provision, the decision of the commission to be final as to the validity of the issue. Before issuing such stocks, bonds, notes, or other evidence of debt, as above mentioned, such corporations or companies shall secure an order from the commission authorizing such issue, the amount thereof, and the purpose and use for which the issue is authorized. *Code 1911, as amended, sec. 2665.*

Any commissioner or any employee of said commission who shall disclose or impart to anyone, except when legally called upon by a court of competent jurisdiction, any fact, knowledge of which was obtained in his official capacity from or through any proceeding filed with the said commission under this section, shall be guilty of a misdemeanor: Provided, that this shall not apply to such facts or information obtained through public hearings or such as are not confidential in their nature. *Same.*

Kansas. A public utility or common carrier may issue stocks, certificates, bonds, notes or other evidences of indebtedness, payable at periods of more than 12 months after the date thereof, when necessary for the acquisition of property, for the purpose of carrying out its corporate powers, the construction, completion, extension or improvements of its facilities, or for the improvements or maintenance of its service, or for the discharge or lawful refunding of its obligations, or for such other purposes as may be authorized by law; provided, and not otherwise, that there shall have been secured from the commission a certificate stating the amount, character, purposes and terms on which such stocks, certificates, bonds, notes or other evidences of indebtedness are proposed to be issued, as set out in the application for such certificate, and that the statements contained in such application have been ascertained to be true. *Laws, 1911, ch. 238, sec. 25.*

Maryland. A common carrier, railroad corporation, street railroad corporation, or other corporation subject to the provisions of this act (or a gas or electrical corporation), organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of Maryland, may issue stocks, bonds, notes or other evidence of indebtedness, payable at periods of more than 12 months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvements of its facilities, or for the improvement or maintenance, extension or improvement of its facilities (or for the construction, completion, extension or improvement of its plant or distributing system in the case of gas or electrical corporations), or for the improvement or maintenance of its service, or the discharge or lawful refunding of its obligations; provided, and not otherwise, that there shall have been secured from commission an order authorizing such issue, and the amount thereof, and stating that, in the opinion of the commission, the use of the capital to be secured by the issue of such stocks, bonds or other evidence of indebtedness is reasonably required for the said purposes of the common carrier, railroad corporation, street

railroad corporation or such corporations (or for the said purposes of the corporation in the case of gas or electrical corporations). *Laws 1910, ch. 180, sec. 27 (common carrier, railroad and street railroad corporations), sec. 34 (gas and electrical corporations), sec. 41 (telephone and telegraph companies), sec. 42 (water, heat, refrigerator and power companies).*

Massachusetts. Railroad corporations and street railway companies shall issue only such amounts of stock and bonds, coupon notes and other evidences of indebtedness payable at periods of more than 12 months after the date thereof, and gas¹ and electric light² companies, corporations established for and engaged in the business of transmitting intelligence by electricity, aqueduct and water companies, shall issue only such amount of stock and bonds, as the railroad commission in the case of railroad corporations or street railway companies, the gas and electric light commission in the case of gas or electric light companies, may from time to time vote, or the commissioner of corporations in the case of other corporations hereinbefore specified may from time to time determine, is reasonably necessary for the purpose for which such issue of stock or bonds has been authorized. *Rev. Laws 1902, as amended, ch. 109, sec. 24.*³

The supreme judicial court or the superior court shall have jurisdiction in equity, upon the application of the railroad commission, the gas and electric light commission, the commissioner of corporations, respectively, of the attorney general, of any stockholder or of any interested party, to enforce the provisions of the three preceding sections and all lawful orders and decisions, conditions or requirements of said boards or commissioner made in pursuance thereof. *Same, sec. 27.*

A railroad corporation shall issue only such amounts of stock and bonds, coupon notes and other evidences of indebtedness payable at periods of more than 12 months after the date thereof, as railroad commission may from time to time determine to be reasonably necessary for the purpose for which such issue of stock or bonds has been authorized. *Acts 1906, ch. 463, pt. ii, sec. 65.*

The supreme judicial court or the superior court shall have jurisdiction in equity upon the application of railroad commission, of the attorney-general, of any stockholder, or of any interested parties, to enforce the provisions of the two preceding sections¹ and all lawful orders and decisions, conditions or requirements of said board made in pursuance thereof. *Same, sec. 67.*

Upon the petition of a street railway company for authority to reduce its capital stock, presented in accordance with a vote of the stockholders at a meeting called for the purpose, the railroad commission may, after a hearing and such examination of the financial condition of the company as it considers necessary, authorize such reduction to be made, if it appears to be consistent with the public interests and with the limitations imposed by general or special laws. A certificate of the amount of the reduction and of any terms and conditions imposed shall be forthwith filed by commission in the office of the secretary of the commonwealth. When such reduction is made, no money or other property shall be paid or transferred to the stockholders unless

¹ No gas company, unless specially authorized, shall issue any bonds at less than the par value, nor for an amount exceeding its capital actually paid in and applied to the purposes of its incorporation. *Revised Laws 1902, as amended, ch. 121, sec. 10.*

² No bonds shall be issued by any corporation furnishing electricity for light or power for an amount exceeding its capital then actually paid in and applied to the purposes of the corporation. *Same, sec. 12.*

³ This section is repealed so far as it applies to railroad corporations and street railway companies.

¹ Section 66 provides that a railroad corporation, unless expressly authorized by its charter or by special law, shall not issue bonds, coupon notes or other evidence of indebtedness, payable at periods of more than 12 months after the date thereof, to an amount which exceeds in the whole the amount of its capital stock at the time actually paid in.

specially authorized by said commission, and by a vote of the directors of the company taken by yeas and nays at a meeting called for the purpose. The directors who vote therefor shall be jointly and severally liable for the debts or contracts of the company which exist at the time when the capital stock is reduced, to the extent of the money or property paid or transferred to the stockholders. *Same, pt. iii, sec. 104.*

A street railway company shall issue only such amounts of stock and bonds, coupon notes and other evidences of indebtedness payable at periods of more than 12 months after the date thereof, as the railroad commission may from time to time determine to be reasonably necessary for the purpose for which such issue of stock or bonds has been authorized. *Same, pt. iii, sec. 107.*

The supreme judicial court or the superior court shall have jurisdiction in equity, upon the application of the board of railroad commission, of the attorney-general, of any stockholder or of any interested party, to enforce the provisions of the two preceding sections¹ and all lawful orders and decisions, conditions or requirements of said commission made in pursuance thereof. *Same, pt. iii, sec. 109.*

Michigan. Any corporation or association, except municipal corporations, organized and existing, or which may hereafter be organized or authorized to do business under the laws of this state, or any lessee or trustee thereof, or any person or persons owning, conducting, managing, operating, or controlling any plant or equipment used wholly or in part in the business of transmitting messages by telephone or telegraph, producing or furnishing heat, light, water or mechanical power to the public, directly or indirectly, and any railroad, interurban railroad or other common carrier may issue stocks, bonds, notes or other evidences of indebtedness payable at periods of more than 12 months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations: Provided, that there shall have been secured from commission an order authorizing such issue and the amount thereof, and stating that in the opinion of commission the use of the capital or property to be acquired to be secured by the issue of such stock, bonds, notes or other evidences of indebtedness, is reasonably required for the purposes of such person, corporation or association. Any such person, corporation or association desiring authority to issue stocks, bonds, notes or other evidences of indebtedness shall make written application therefor to the said commission in such form as commission may require: Provided that the provisions of this act shall apply to all stock, shares, bonds or notes issued to or taken by the incorporators or their agents, assigns or trustees of any such corporation or association in the first instance. *Pub. Acts 1911, no. 177, sec. 1.*

Nebraska. A common carrier or public service corporation organized, and incorporated or hereafter incorporated, under or by virtue of the laws of Nebraska, may issue stocks, bonds, notes or other evidence of indebtedness payable at period of more than 12 months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations, provided, and not otherwise, that there shall have been secured from commission an order authorizing such issue and the amount thereof and stating that in the opinion of commission the use of the capital to be secured by the issue of such

¹ Section 108 provides that a street railway company, unless expressly authorized by its charter or by special law, shall not issue bonds, coupon notes or other evidences of indebtedness, payable at periods of more than 12 months after the date thereof, to an amount which exceeds in the whole the amount of its capital stock at the time actually paid in.

stock, bonds, notes or other evidence of indebtedness is reasonably required for the said purposes of the corporation. *Laws 1909, ch. 108, sec. 1.*

New Hampshire. No railroad corporation or public utility shall issue any stock, bonds, notes or other evidences of indebtedness payable more than 12 months after the date thereof, without first procuring an order of commission authorizing the same. *Laws 1911, ch. 164, sec. 14(a).*

New Jersey. No public utility as herein defined shall hereafter issue any stocks, stock certificates, bonds or other evidences of indebtedness payable in more than one year from the date thereof until it shall have first obtained authority from commission for such proposed issue. *Laws 1911, ch. 195, sec. 18(e).*

New York. A common carrier, railroad corporation or street railroad corporation (or a gas or electrical corporation) organized or existing, or hereafter incorporated, under or by virtue of the laws of this state, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than 12 months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities (or plant or distributing system in the case of gas or electrical corporations), or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income, or from any other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation within five years next prior to the filing of an application with the proper commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made; provided, and not otherwise, that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labour to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been reasonably required for the purposes specified in the order, and that except as otherwise permitted in the order in the case of bonds, notes and other evidence of indebtedness, such purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income. Nothing herein contained shall prohibit the commission from giving its consent to the issue of bonds, notes or other evidence of indebtedness for the reimbursement of moneys heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements, prior to five years next preceding the filing of an application therefor, if in the judgment of the commission such consent should be granted; provided application for such consent shall be made prior to January 1, 1912. *Laws 1910, ch. 480, sec. 55 (common carrier, railroad and street railroad corporations), sec. 69 (gas and electrical corporations).*

Held, that in the case of a gas and electrical corporation the commission has no power to withhold approval of an issue of securities merely to prevent competitor from entering the field of an existing company. *People vs. Public Service Commission*, 122 N.Y.S. 641.

As the public service law leaves the management of its affairs with the corporation except in so far as clearly affected, it was held, that the commission had no right to refuse approval of an issue of securities to refund legal obligation, in the manner provided by the statute, upon the ground that the debt was greater than should have been incurred for the purpose. *People ex. rel. Delaware and Hudson Company vs. Stevens*, 197 N.Y. 1.

Under section 55 the commission is not justified in refusing to consent to the issue of securities by a railroad corporation under a plan of reorganization after foreclosure because

the value of the mortgaged property and amount of new capital to be subscribed is less than the amount of securities to be issued. *People ex. rel. Third Ave. Railway vs. Public Service Commission*, 203 N.Y. 299.

The commission has no power to permit an issue of securities not permitted by the terms of the statute upon condition that outstanding stock of the utility be cancelled; but can simply determine whether the proposed issue of stock is in accordance with the statute. *People ex. rel. Binghamton L., H. & P. Co. vs. Stevens*, 203 N.Y. 789.

Where railroad company sold certain rolling stock to a trust company which leased it to other roads which gave trust company certificates to be paid in instalments, but called rent, it was held, that this was "other evidences of indebtedness" within section 55 and consent of the commission should be received. *People vs. New York Central & H. R. R.*, 92 N.E. (N.Y.) 1906.

A telegraph or telephone corporation may when authorized by order of commission, and not otherwise, issue stock, bonds, notes or other evidence of indebtedness payable at periods of more than 12 months after the date thereof when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities or the improvement or maintenance of its service within the state, or for the discharge or lawful refunding of its obligation, or reimbursement of moneys actually expended from the income from any source, within five years next prior to the filing of the application therefor, or for any of such purposes, provided, however, that no order shall be granted authorizing such issue for reimbursement of moneys expended from income for betterments or replacements unless the applicant shall have kept its accounts and vouchers of such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditures were made. The commission may by order authorize the issue of bonds, notes or other evidence of indebtedness for the reimbursement of moneys heretofore actually expended from income for any of the purposes herein specified, except maintenance of service or replacements prior to five years next preceding the filing of the application therefor, provided such application be made prior to January 1, 1912. *Same*, sec. 101(1).

Subject to the limitations and requirements of this chapter and of the public service commissions law every railroad corporation, in addition to the powers given by the general and stock corporation laws, shall have power from time to time to borrow such sums of money as may be necessary for completing and finishing or operating or improving its railroad, or for any other of its lawful purposes and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its property and franchises to secure the payment of any debts contracted by the company for the purposes aforesaid, notwithstanding any limitation on such power contained in any general or special law. But no mortgage except purchase-money mortgages shall be issued by any railroad corporation under this chapter, or any other law, without the consent of the commission, and the consent of the stockholders owning at least two-thirds of the stock of the corporation, which consent shall be in writing, and shall be given and certified and be filed and recorded in the office of the clerk or register of the county where it has its principal place of business, as provided in section six of the stock corporation law; or else the consent of the public service commission and the consent by their votes of stockholders owning at least two-thirds of the stock of the corporation which is represented and voted upon in person or by proxy at a meeting called for that purpose upon a notice stating the time, place and object of the meeting, served at least three weeks previously upon each stockholder personally, or mailed to him at his post office address, and also published at least once a week for three weeks successively in some newspaper printed in the city, town or county where such corporation has its principal office, and a certificate of the vote at such meeting shall be signed and sworn to and shall be filed and recorded as provided by section six of the stock corporation law. When authorized by the stockholders' consent to any bonds made or issued under this section, the directors, under such regulations as they may adopt, may confer on the holder of any such bonds the right to convert the principal thereof, after two and not more than 12 years from

the date of the bond, into stock of the corporation at a price fixed by the board of directors, which may be either par or a price not less than the market value thereof at the date of such consent to such bonds; and if the capital stock shall not be sufficient to meet the conversion when made, the board of directors shall authorize an increase of capital stock sufficient for that purpose. *Laws 1910, ch. 481, sec. 8 (10).*

Ohio. A public utility or a railroad may when authorized by order of commission, and not otherwise, issue stocks, bonds, notes and other evidences of indebtedness, payable at periods of more than 12 months after date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities or for the improvement or maintenance of its service, or for the reorganization or readjustment of its indebtedness and capitalization, or for the discharge or lawful refunding of its obligations, or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility or railroad not secured or obtained from the issue of stocks, bonds, notes or other evidences of indebtedness of such public utility or railroad within five years next prior to the filing of an application therefor as herein provided, or for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditures in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which said expenditure was made. The commission may, by order duly made, authorize the issue of bonds, notes, or other evidence of indebtedness, for the reimbursement of money heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements prior to five years next preceding the filing of an application therefor, if such application for such consent be made prior to January 1, 1913. *Laws 1911, no. 325, sec. 56.*

Texas. Whenever any railroad company in this state shall hereafter desire to make, issue and sell any bonds or evidences of debt which are to become a lien on its property, it shall comply with the laws of this state regulating the same and in addition thereto shall have said bonds prepared, signed by the president of the company, and attested by the secretary, with the seal of the company attached thereto. Each bond shall be numbered, beginning with number one, or the next highest number of any preceding bond issued by it, and continue consecutively until all are numbered. The bonds shall be dated, made payable at a time not exceeding 30 years from date, and shall bear interest not exceeding six per cent per annum. The said bonds, when thus prepared, shall be presented to the commission with a statement in writing, signed and sworn to by the president of said company, showing the amount of the stock of said company, and the amount of outstanding bonds, if any, of said company. *Sayles' Civil Stats. 1897, as amended, art. 4584(h).*

Hereafter no bonds or other indebtedness shall be increased or issued or executed by any authority whatsoever and secured by lien or mortgage on any railroad or part of railroad, or the franchise or property appurtenant or belonging thereto, over or above the reasonable value of said railroad property; provided, that in case of emergency, on conclusive proof shown by the company to the railroad commission that public interests or the preservation of the property demanded it, the said commission may permit said bonds, together with the stock in the aggregate, to be executed to an amount not more than 50 per cent over the value of said property. *Same, art. 4584(b).*

Vermont. A corporation organized under the laws of this state, subject to the provisions of this act, shall not increase its capital stock nor issue mortgages, bonds or other securities except such as are payable within one year from date of issue, without first securing the permission of the public service commission on petition and hearing for that purpose. Such corporation desiring to increase its capital stock or to

issue mortgages, bonds or other securities, not payable within one year from date of issue, may petition said commission for such permission, and said commission shall thereupon appoint a time and place for hearing the petition. Said commission shall give reasonable notice in writing by mail of the time and place of hearing thereon to such petitioner, the attorney-general and the state's attorney of the county wherein such petitioner has its principal place of business in this state, and may in its discretion publish one or more times a notice of the pendency of such petition and of the time and place of hearing thereon in one or more newspapers published in the county wherein such principal office is located, and for want of such newspaper, in an adjoining county. The attorney general or state's attorney of the county shall represent the state in such hearing. *Laws 1908, no. 116, sec. 16.*

Wisconsin. No public service corporation shall hereafter issue for any purposes connected with or relating to any part of its business, any stocks, certificates of stock, bonds, notes or other evidences of indebtedness, to an amount exceeding that which may from time to time be reasonably necessary for the purpose for which such issue of stock, certificates of stock, bonds, notes, or other evidences of indebtedness may be authorized. *Laws 1911, ch. 593, sec. 1753-4.*

The term "public service corporation" when used in this act shall mean and embrace every railroad, street railway, telegraph, telephone, express, freight line, sleeping car, light, heat, water, and power corporation, and all other corporations, excepting towns, villages, and cities, engaged in the business of supplying the public, directly or indirectly, with light, heat, power, or water, or in transmitting telegraph or telephone messages, or in transporting passengers, freight, or express. *Laws 1911, ch. 593, sec. 1753-1.*

The term "commission" when used in this act shall mean the railroad commission of Wisconsin; the term "capital account" when used in this act shall mean the capital account prescribed by the commission and required to be kept by every public service corporation as provided by law. *Same.*

The term "net income or revenue" when used in this act shall mean the money available for dividends and surplus according to the accounts prescribed by the commission and required to be kept by every public service corporation. *Same.*

A public service corporation may issue stocks, certificates of stock, bonds, notes or other evidences of indebtedness, when necessary for organization expenses and all other expenses reasonably required in connection with the financing and construction of its property, for the acquisition of property, the construction, completion, extension, or improvement of its plant, distributing system, or facilities, or for the improvement of its service, or for the discharge or refunding of its legal obligations, or in case of railroad corporation for any of the purposes stated in section 1826 or subsection 10 of section 1828 of the statutes, provided, however, that no such corporation shall issue any stocks or certificates of stock for any purpose which is not properly chargeable to its capital account; and that if any such corporation shall issue any bonds, notes, or other evidences of indebtedness for any lawful purpose which is not properly chargeable to its capital account, it shall set aside annually from its net income or revenue if any, such a sum that when such bonds, notes, or other evidences of indebtedness shall become due and payable, the total amount of said sums so set aside shall be sufficient to pay and discharge the same. *Same, sec. 1753-5.*

No public service corporation shall issue any stocks, certificates of stock, bonds, notes or other evidences of indebtedness for the purpose of paying, discharging, refunding, exchanging for, or retiring, in whole or in part, directly or indirectly, any of its bonds, notes, or other evidences of indebtedness, payable at periods of less than one year after the date thereof, which were issued for purposes not properly chargeable to its capital account. *Same, sec. 1753-6.*

No public service corporation shall issue any stock or certificate of stock, except in consideration of money, or of labor or property, at its true money value, as found and determined by the commission as in this act provided, actually received by it, equal to the face value thereof, or any bonds, notes or other evidences of indebtedness except for money, or for labor or property estimated at its true money value, as found

and determined by the commission as in this act provided, actually received by it equal to a sum not less than 75 per cent of the face value thereof, provided, however, that no bonds, notes, or other evidences of indebtedness of any such corporation issued for the purpose of refunding, retiring, or discharging any of its bonds, notes, or other evidences of indebtedness, shall be issued at less than 75 per cent of the face value thereof, plus the amount or any discount hereafter paid or incurred by such corporation upon the issuance of the bonds, notes or other evidences of indebtedness to be refunded, retired, or discharged. *Same, sec. 1753-7.*

The amount of bonds, notes, or other evidences of indebtedness which any public service corporation may issue shall bear a reasonable proportion to the amount of stock and certificates of stock issued by such corporation, due consideration being given to the nature of the business in which the corporation is engaged, its credit and future prospects, the effect which such issue will have upon the management and efficient operation of the corporation by reason of the relative amount of financial interest which the stockholders will have in the corporation, and the circumstances surrounding the operation and business of the corporation. *Same, sec. 1753-8.*

No public service corporation shall hereafter issue any stocks, certificates of stock, bonds, notes, or any other evidence of indebtedness, except such as are issued for money only and payable one year or less from the date thereof, until it shall have first obtained authority for such issue from the commission, as herein provided. *Same, sec. 1753-9(1).*

Nothing in section 1753-9 contained, shall be construed to prohibit the commission from authorizing in such certificate the mortgage or pledge by any public service corporation of any bond, note, or other evidence of indebtedness issued by such corporation as security for or as part security for any bond, note, or other evidence of indebtedness issued by or loan made to such corporation which shall not be issued or made in violation of the provisions of this act, provided, that the terms of said loan and of such notes, bonds, or other evidences of indebtedness shall provide that none of said pledged bonds, notes, or other evidences of indebtedness shall, upon non-payment of the notes, bonds or other evidences of indebtedness which they are pledged to secure, or upon non-performance of any of the conditions thereof, be sold, or become the property of the holders of the notes, bonds, or other evidences of indebtedness so secured, either directly or through a trustee for their benefit, except at or through public sale, notice whereof shall be published once a week for not less than three successive weeks prior thereto, in at least one newspaper of general circulation printed in the English language and published in the place where such sale shall take place, and except at a sum not less than 75 per cent of the face value thereof, plus the discount, if any, paid or incurred by the corporation upon the notes, bonds, or other evidence of indebtedness which they are pledged to secure. *Same, sec. 1753-10.*

Before the issuance of the certificate in this act provided, authorizing any public service corporation to issue bonds, notes, or other evidences of indebtedness, for purposes properly chargeable to its capital account, such corporation shall pay the commission a fee of \$1 for each \$1,000 of the face value of the bonds, notes or other evidences of indebtedness to be issued by virtue of such authority, provided that no fee shall be required when such issue is made for the purpose of guaranteeing, taking over, refunding, discharging, or retiring any bonds, notes, or other evidences of indebtedness. Such fees when collected shall be paid into the common school fund income. *Same, sec. 1753-21.*

D. POWER OF COMMISSION TO AUTHORIZE ISSUES.

Arizona, California. The commission may authorize issues of bonds, notes or other evidences of indebtedness, less than, equivalent to or greater than the authorized or subscribed capital stock of a public utility corporation,¹ and the provisions of

¹ "Public service corporation," in Arizona.

section 309 and 456 of the civil code of this state, in so far as they contain inhibitions against the creation by corporations of indebtedness, evidenced by bonds, notes or otherwise, in excess of their total authorized or subscribed capital stock shall have no application to public utility corporations. *Ariz.—Session Laws 1912, ch. 90, sec. 52 (b); Cal.—Stats. 1911, ch. 14, sec. 52 (a).*

The commission may by its order grant permission for the issue of such stock or stock certificates or bonds, notes or other evidences of indebtedness in the amount applied for, or in a lesser amount, or not at all, and may attach to the exercise of its permission such condition or conditions as it may deem reasonable and necessary. *Ariz.—Same; Cal.—Same, sec 52 (b).*

Kansas. Upon full compliance by the applicant with the provisions of this section, the commission shall forthwith issue a certificate stating the amount, character, purposes and terms upon which such stocks, certificates, bonds, notes or other evidences of indebtedness are proposed to be issued, as set out in the application for such certificate, and that the statements contained in such application have been ascertained to be true. *Laws 1911, ch. 238, sec. 25.*

Massachusetts. The Commission (or commissioner) shall render a decision upon an application for such issue within 30 days after the final hearing thereon. Such decision shall be in writing, shall assign the reasons therefor, shall, if authorizing such issue, specify the respective amounts of stock, or bonds, or of coupon notes, or other evidences of indebtedness, as aforesaid, which are authorized to be issued for the respective purposes to which the proceeds thereof are to be applied, shall within seven days after it has been rendered, be filed in the office of said commission (or commissioner). A certificate of the decision of said commission shall within three days after such decision has been rendered, and before the stock or bonds or coupon notes or other evidences of indebtedness, as aforesaid, are issued, be filed in the office of the secretary of the commonwealth and duplicate thereof delivered to the corporation. *Rev. Laws 1902, ch. 109, sec. 24 (gas, electric, aqueduct, water companies and companies for transmitting intelligence by electricity). Acts 1906, ch. 463, pt. ii, sec. 65 (railroad corporations); pt. iii, sec. 107 (street railway companies).*

If, when the gas and electric light commission approve an issue of new stock or bonds by a gas or electric light company, it determines that the fair structural value of the plant of such company is less than its outstanding stock and debt, it may prescribe such conditions and requirements as it determines are best adapted to make good within a reasonable time the impairment of the capital stock; or, before allowing an increase, it may require the capital stock to be reduced by a prescribed amount not exceeding the amount of such impairment. The amount of impairment and the conditions and requirements imposed shall be stated in the annual report of the commission. *Rev. Laws 1902, ch. 109, sec. 26.*

Under sections 24 and 26 the only way in which the gas and electric light commission can require an impairment of capital to be made good out of earnings is by imposing such conditions upon any further issue of stock or bonds of the company. *Childs vs. Krey, 199 Mass, 352.*

Michigan. If from the application filed and such other information obtained from the investigation herein authorized, the said commission shall be satisfied that the funds derived from such issue of stocks, bonds or notes are to be applied to lawful purposes and that such issue and amount are essential to the successful carrying out of such purposes, then said commission shall grant authority to make the issue applied for. *Pub. Acts 1911, no. 177, sec. 1, amending Pub. Acts 1909, no. 144.*

New Hampshire. Upon petition of directors of a railroad corporation, or public utility, the commission shall, after public notice and hearing, determine the amount of stock or bonds which in its opinion, is reasonably requisite for the purposes for which the issue is to be made, and shall, within 30 days after final hearing upon such

petition, file in the office of the secretary of state a certificate setting out the amount of the increase which it has authorized and the purposes for which the proceeds of such new stock or bonds may be used. *Laws 1911, ch. 164, sec. 14(a).*

New Jersey. It shall be the duty of the commission, after hearing, to approve of any such proposed issue maturing in more than one year from the date thereof, when satisfied that the same is to be made in accordance with law and the purpose of such issue be approved by said commission. *Laws 1911, ch. 195, sec. 18 (e).*

New York. The order of the commission shall fix the amount of any such issue and the purposes to which it or its proceeds are to be applied, and recite that in the opinion of the commission the money, property or labor procured or to be procured or paid for by such issue, or its proceeds has been or is reasonably required for the purposes specified in the order, and that such purposes are in no part reasonably chargeable to operating expenses or to income, except in the case of bonds, notes or other evidences of indebtedness as may be permitted in the order. *Laws 1910, ch. 480, sec. 101(1) (telegraph and telephone corporations).*

Ohio. The order of the commission shall fix the amount, character and terms of any such issue and the purposes to which the issue or any proceeds thereof shall be applied, and recite that the money, property, consideration or labor procured, or to be procured or paid for by such issue, has been or is reasonably required for the purposes specified in the order, and the value of any property, consideration or service, as the case may be, as found by the commission, for which, in whole or in part, such issue is proposed to be made. *Laws 1911, No. 325, sec. 58.*

It shall be the duty of the commission to authorize on the best terms obtainable such issues of stocks, bonds and other evidences of indebtedness as shall be necessary to enable any public utility to comply with the provisions of any contract heretofore made between such public utility and any municipality. *Same sec. 56.*

Texas. If said bonds are such as are permitted under this law, and commission shall be so satisfied, it shall approve said bonds and shall issue to the secretary of state a direction to register said bonds, specifying the numbers, dates and amounts thereof, and said commission shall keep in its office a correct record of the bonds so approved by it, giving the name of the company, the numbers, dates of execution and maturity of the bonds the amount and rate of interest of each and the date of approval. *Sayles' Civil Stats. 1896, art. 4584 (h).*

Vermont. The commission shall have jurisdiction, on due notice, to hear, determine, render judgment and make orders and decrees in all matters respecting the issue of stock, mortgage bonds or the issue of other securities in order to prevent over capitalization. *Pub. Stats, 1906, as amended, sec. 4611 (vii).*

If the commission, after due hearing, is satisfied that such corporation ought to be permitted to increase its capital stock, or to issue such mortgages, bonds or other securities, and that the same is required for the proper development of the business of such corporation, and that the same will be promotive of the general good of the public, said commission shall then issue to said corporation a certificate under its seal, stating the amount of increase, manner, terms and conditions under which the same may be issued. *Laws 1908, No. 116, sec. 16.*

Wisconsin. The commission shall find and determine the amount of such stock, certificates of stock, bonds, notes, or other evidences of indebtedness (issues for money only) reasonably necessary for the purposes for which the same are to be issued. *Laws 1911, ch. 593, sec. 1753-9(2).*

If the commission shall determine that such proposed issue (for money only) complies with the provisions of this act such authority shall thereupon be granted, and it shall issue to the corporation a certificate of authority, stating: (a) the amount of such stocks, certificate of stock, bonds, notes, or other evidences of indebtedness reasonably necessary for the purposes for which they are to be issued, and the character of the same; (b) the purposes for which they are to be issued; and (c) the terms upon which they are to be issued. *Same, sec. 1753-9 (3).*

If the commission shall determine that the proposed issue (for other than money) complies with the provisions of this act, such authority shall thereupon be granted and it shall issue to the corporation a certificate of authority stating: (a) the amount of such stocks, certificates of stock, bonds, notes, or other evidences of indebtedness reasonably necessary for the purposes for which they are to be issued, and the character of the same; (b) the purposes for which they are to be issued; (c) the terms upon which they are to be issued, and (d) the true value of the property, services, or other consideration than money (which shall be described in detail) as found and determined by the commission, for which, in whole or in part, such issue is to be made. *Same, sec. 1753-9 (6).*

E. CHARACTER OF INVESTIGATION BY COMMISSION.

Arizona, California, Georgia, Maryland. To enable it to determine whether it will issue such order, the commission shall hold a hearing and may make such additional inquiry or investigation and examine such witnesses, books, documents, papers and contracts and require the filing of such data as it may deem of assistance.¹ *Ariz.—Session Laws 1912, ch. 90, sec. 52 (b); Cal.—Stats. 1911, ch. 14, sec. 52 (b); Ga.—Code 1911, as amended, sec. 2665; Md.—Laws 1910, ch. 180, sec. 27 (common carrier, railroad and street railroad corporations), sec. 34 (gas and electrical corporations), sec. 41 (telephone and telegraph corporations), sec. 42 (water, heat, refrigerator and power companies).*

Michigan. After receiving such application, said commission may, for the purpose of enabling it to determine whether it should grant such authority, make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. If the applicant shall fail, neglect, or refuse to furnish any or all of the information required by said commission, or if the said commission shall so direct, an appraisal of the property of said applicant, shall be made by a disinterested person or persons to be appointed by said commission and whose compensation shall be fixed by said commission, the entire expense of making such appraisal to be borne by said applicant. After said appraisal is made and filed with said commission and before any action is taken by said commission upon said application, the expenses of said appraisal as determined by said commission shall be paid by said applicant to said commission, which shall deposit the same in the treasury of the state to be credited to the general fund, taking the receipt of the treasurer therefor and filing the same in its office with said application. If the applicant shall refuse or neglect to pay the expense of said appraisal, the commission shall dismiss such application and said commission may bring an action against said applicant in any court of competent jurisdiction in this state for the recovery of the expense of said appraisal. The expense of said appraisal shall be paid by the state treasurer upon the warrant of the auditor general to the persons certified by the commission to be entitled thereto. *Pub. Acts 1911, no. 177, sec. 1.*

¹ Georgia—"deem advisable"; Maryland—"deem of importance in enabling it to reach a determination"; Ohio—"deem proper."

Nebraska, New York, Ohio. Identical with Maryland provision. *Neb.—Laws 1909, ch. 108, sec. 1; N. Y.—Laws 1910, ch. 480, sec. 55 (common carrier, railroad and street railroad corporations), sec. 69 (gas and electrical corporations), sec. 101(1) (telephone and telegraph corporations); Ohio—Laws 1911, no. 325, sec. 58.*

Wisconsin. For the purpose of enabling it to determine whether the proposed issue (for other than money) complies with the provisions of this act, the commission shall determine the true valuation in detail of the property, services or other consideration, other than money, for which it is proposed to issue, in whole or in part, such stocks, certificates of stock, bonds, notes or other evidences of indebtedness, and shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. *Laws 1911, ch. 593, sec. 1753-9(5).*

For the purpose of enabling it to determine whether the proposed issue (for money only) complies with the provisions of this act, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. It may also make a valuation of all the property of the corporation if it deems it pertinent to the inquiry or investigation. *Same, sec. 1753-9(2).*

Any such public service corporation, if dissatisfied with any valuation made by the commission, or any order or certificate made or issued by it, may commence an action in the circuit court of Dane county against the commission, as defendant, to vacate and set aside such valuation, order, or certificate on the ground that the same is unreasonable or unlawful, in which action the complaint shall be served with the summons. Sections 1797-16 and 1797-17 of the statutes shall apply to all the rights of the parties to the proceeding in such action. *Same, Sec. 1753-16.*

F. PROCEEDINGS FOR OBTAINING CERTIFICATE AND CONDITIONS OF ITS ISSUE.

1. Issues for Money Only.

Kansas. The proceedings for obtaining such certificate from commission and the conditions of its being issued by commission shall be as follows: In case the stocks, certificates, bonds, notes or other evidences of indebtedness are to be issued for money only, the public utility or common carrier shall file with the commission a statement, signed and verified by the president or other chief officer of the company having knowledge of the facts, showing (1) the amount and character of the proposed stocks, certificates, bonds, notes or other evidences of indebtedness; (2) the general purposes for which they are to be issued; (3) the terms on which they are to be issued; (4) the total assets and liabilities of the public utility or common carrier; and (5) that the capital sought to be secured by the issuance of such stocks, certificates, bonds, notes or other evidences of indebtedness is necessary and required for such purposes and will be used therefor. *Laws 1911, ch. 238, sec. 25.*

The commission may also require the public utility or common carrier to furnish such further statements of facts as may be reasonable and pertinent to the inquiry, and shall have full power to ascertain the truth of all statements made by such common carrier or public utility. *Same.*

Ohio. The proceedings for obtaining the consent and authority of the commission for such issue as provided in the next preceding section of this act, shall be as follows, in case the stocks, bonds, notes, or other evidence of indebtedness are to be issued for money only: The public utility or railroad shall file with the commission a statement, signed and verified by the president and secretary thereof setting forth (1) the amount and character of the stocks, bonds or other evidence of indebtedness; (2) the purposes

for which they are to be issued; (3) the terms upon which they are to be issued; (4) the total assets and liabilities of the public utility or railroad in such detail as the commission may require; (5) if the issue is desired for the purpose of the reimbursement of money expended from income, as herein provided, the amount expended, when and for what purposes expended; (6) such other facts and information pertinent to the inquiry as the commission may require. *Laws 1911, No. 325, sec 57.*

Wisconsin. The proceedings for obtaining a certificate of such authority from the commission and the conditions of its being granted by the commission shall be as follows: In case the stocks, certificates of stock, bonds, notes or other evidences of indebtedness are payable at periods of more than one year after the date thereof, and are to be issued for money only, the corporation shall file with the commission a statement, signed and verified by its president and secretary, setting forth (1) the amount and character of the proposed stocks, certificates of stock, bonds, notes, or other evidences of indebtedness; (2) the purposes for which they are to be issued; (3) the terms on which they are to be issued, and (4) the total assets and liabilities, and the previous financial operations and business of the corporation, in such detail as the commission may require. *Laws 1911, ch. 593, sec 1753-9 (1).*

The signers of the articles of association of a public service corporation hereafter organized may sign and verify such statement in the first instance. *Same, sec. 1753-9(2).*

2. Issues for Other Than Money.

Kansas. In case the stocks, certificates, bonds, notes or other evidences of indebtedness are to be issued partly or wholly for property or services or other consideration than money, the public utility or common carrier shall file with the commission a statement, signed and verified by the president or other chief officer having knowledge of the facts, showing: (1) the amount and character of the stocks, certificates, bonds, notes or other evidences of indebtedness proposed to be issued; (2) the general purposes for which they are to be issued; (3) a general description and an estimated value of the property or services for which they are to be issued; (4) the terms on which they are to be issued or exchanged; (5) the amount of money, if any, to be received for the same in addition to such property, services or other consideration; (6) the total assets and liabilities of the public utility or common carrier; and (7) that the capital sought to be secured by the issuance of such stocks, certificates, bonds, notes or other evidences of indebtedness is necessary and required for such purposes and will be used therefor. *Laws 1911, ch. 238, sec. 25.*

The commission may also require the public utility or common carrier to furnish such further statements of facts as may be reasonable and pertinent to the inquiry, and shall have full power to ascertain the truth of all statements made by such common carrier or public utility. *Same.*

Ohio. If the stocks, bonds, notes or other evidence of indebtedness are to be issued, partly or wholly for property or services or other consideration than money the public utility or railroad shall file with the commission a statement, signed and verified by its president and secretary setting forth: (1) the amount and character of the stocks, bonds or other evidence of indebtedness proposed to be issued; (2) the purposes for which they are to be issued; (3) the description and estimated value of the property or services for which they are to be issued; (4) the terms on which they are to be issued or exchanged; (5) the amount of money, if any, to be received from the same in addition to the property, service or other consideration; (6) the total assets and liabilities of the public utility or railroad in such detail as the commission may require, and (7) such other facts and information pertinent to the inquiry as the commission may require. *Law 1911, No. 325, sec. 57.*

Wisconsin. In case the stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, payable in more than one year after the date thereof, or payable in less than one year from the date thereof when issued for purposes properly chargeable to its capital account, are to be issued, partly or wholly, for property or services or other consideration than money, the corporation shall file with the commission a statement, signed and verified by its president and secretary, setting forth: (1) the amount and character of the stocks, certificates of stock, bonds, notes, or other evidences of indebtedness proposed to be issued; (2) the purposes for which they are to be issued; (3) the description in detail and estimated value of the property or services for which they are to be issued; (4) the terms on which they are to be issued or exchanged; (5) the amount of money, if any, to be received for the same, in addition to such property, services, or other consideration, and (6) the total assets and liabilities, and the previous financial operations and business of the corporation, in such detail as the commission may require. *Laws 1911, ch. 593, sec. 1753-9 (4).*

The signers of the articles of association of a public service corporation hereafter organized may sign and verify such statement in the first instance. *Same, sec. 1753-9 (5).*

G. LIMITATIONS ON APPLICATION OF ACTS.

Kansas. This provision shall not apply to any lawful issue of stock the lawful execution and delivery of any mortgage, or to the lawful issue of any bonds thereunder which shall have been duly approved by the commission prior to the taking effect of this act. *Laws 1911, ch. 233, sec. 25.*

Maryland. Substantially similar to Kansas provision. *Laws 1910, ch. 180, sec. 27 (common carrier, railroad and street railroad corporations) sec. 41 (telephone and telegraph companies), sec. 42 (water, heat, refrigerator and power companies.)*

Massachusetts. The provisions of this section shall not require the approval of the railroad commission to the issue of capital stock or bonds or of coupon notes, or other evidences of indebtedness, as aforesaid, authorized by law of this commonwealth, the proceeds of which are to be expended in another state or country, or which are to pay for borrowed money expended in another state or country. *Acts 1906, ch. 463, pt. ii, sec. 65 (railroad companies).*

New Hampshire. No public utility or railroad corporation not owning, operating or maintaining a railroad within this state, subject to the provisions of this act, shall be required to apply to the commission for authority to issue stocks, bonds, notes or other evidence of indebtedness, except for the acquisition of property, the construction, completion, extension or improvement of its facilities, or the improvement or maintenance of its service within this state, or the discharge or refunding of its obligations or reimbursement of moneys actually expended for such purposes. *Laws 1911, ch. 164, sec. 14 (a).*

New York. This provision shall not apply to any lawful issue of stock, to the lawful execution and delivery of any mortgage, or to the lawful issue of any bonds thereunder, which shall have been duly approved by the board of railroad commissioners before July 1, 1907. *Laws 1910, ch. 480, sec. 55 (common carrier, railroad and street railroad companies).*

No telegraph corporation or telephone corporation shall be required to apply to the commission for authority to issue stocks, bonds, notes or other evidence of indebtedness, except for the acquisition of property, the construction, completion, extension or improvement of its facilities, or the improvement or maintenance of its

service within the state, or the discharge or refunding of obligations or reimbursement of moneys actually expended for such purposes. *Same, sec. 101(1).*

Ohio. No interstate railroad or public utility shall be required to apply to the commission for authority to issue stock, bonds, notes or other evidence of indebtedness for the acquisition of property, the construction, completion, extension or improvement of its facilities, or the improvement or maintenance of its service outside the state, or for the discharge or refunding of obligations issued or incurred for such purposes, or for the reimbursement of moneys actually expended for such purposes outside the state. *Laws 1911, no. 325, sec. 58.*

Texas. This provision shall not apply to receivers' certificates where the amount does not exceed \$100,000. *Sayles' Civ. Stats. 1906, art. 4584(h).*

Vermont. Nothing contained in this act shall apply to a mortgage heretofore executed and recorded, nor to bonds thereby secured. *Laws 1908, no. 116, sec. 16.*

Wisconsin. The provisions of this act shall not apply to any stock, bonds or other evidence of indebtedness heretofore authorized by the commission. *Laws 1911, ch. 593, sec. 1753-22.*

H. UTILITIES AUTHORIZED TO ISSUE NOTES FOR LIMITED PERIODS WITHOUT CERTIFICATE.

Arizona, California. A public utility¹ may issue notes for proper purposes and not in violation of any provisions of this act or any other act, payable at periods of not more than 12 months after the date of issuance of same, without the consent of the commission, but no such notes shall, in whole or in part, be refunded by any issue of stocks or stock certificates, or of bonds, notes of any term or character, or any other evidence of indebtedness, without the consent of the commission. *Ariz.—Session Laws 1912, ch. 90, sec. 52(b); Cal.—Stats. 1911, ch. 14, sec. 52(a).*

Georgia. Such corporations or companies may issue notes or other evidences of indebtedness for proper corporate purposes and not in violation of any law, payable at periods of not more than 12 months from date, without such consent, but no such notes or other evidences of indebtedness shall, in whole or in part, directly or indirectly, be refunded by any issue of stocks or bonds, or by any evidence of indebtedness running for more than 12 months, without the consent of the commission. *Code 1911, as amended, sec. 2665.*

Kansas. Any issue of stocks, certificates, bonds, notes or other evidences of indebtedness not payable within one year, which shall be issued by such public utility or common carrier contrary to the provisions of this act shall be void. *Laws 1911, ch. 238, sec. 25.*

Maryland. Identical with Georgia provision in authorizing issue of notes only for periods not exceeding 12 months. *Laws 1910, ch. 180, sec. 27 (common carrier, railroad and street railroad corporations), sec. 34 (gas and electrical corporations), sec. 41 (telephone and telegraph corporations), sec. 42 (water, heat, refrigerator and power corporations).*

Michigan. Any such person, corporation or association may issue notes for lawful purposes, payable at periods of not more than 24 months, without authority from

¹ "Public service corporation," in Arizona.

said commission; but no such notes shall, in whole or in part, directly or indirectly, be refunded by any issue of stock or bonds, or by any evidence of indebtedness running for more than 12 months, without the consent of said commission. *Pub. Acts 1911, no. 177, sec. 1.*

Nebraska, New York, Ohio. Substantially identical with Georgia provision in authorizing issue of notes only. *Neb.—Laws 1909, ch. 108, sec. 1; N. Y.—Laws 1910, ch. 480, sec. 55 (common carrier, railroad and street railroad corporations), sec. 69 (gas and electrical corporations), sec. 101(1) (telegraph and telephone corporations); Ohio—Laws 1911, No. 325, sec. 58.*

Wisconsin. Except as otherwise provided herein, the provisions of this act shall apply to the issue by public service corporations of stocks, certificates of stock, bonds, notes or other evidences of indebtedness, payable at periods of more than one year after the date thereof. *Laws 1911, ch. 593, sec. 1753-3.*

I. ISSUE OF STOCKS OR BONDS FOR FRANCHISES OR PROPERTY OF OTHER PUBLIC UTILITIES.

New Hampshire. The commission may authorize a public utility to issue its stocks or bonds in payment for property or stocks, bonds or other securities of like corporations which it may lawfully acquire, upon such terms as the commission may approve, having due regard to the public good. *Laws 1911, ch. 164, sec. 14(e).*

J. CAPITALIZATION OF REORGANIZED UTILITIES.

New York. Reorganizations of railroad corporations, street railroad corporations and common carriers pursuant to sections nine and ten of the stock corporation law and such other laws as may be enacted from time to time shall be subject to the supervision and control of the proper commission and no such reorganization shall be had without the authorization of such commission. *Laws 1912, ch. 289, sec. 1.*

Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the commission which, in making its determination, shall not exceed the fair value of the property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash, provided, however, that the commission may make due allowance for discount of bonds. Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the commission. *Same, sec. 2.*

Ohio. Where a public utility or railroad is, at the time this act takes effect, in the possession of one or more receivers or its property is under foreclosure, and a reorganization thereof is pending, any new company or companies that may hereafter be organized to acquire such property or any part thereof shall be exempt from all the provisions of this act with respect to the issue of bonds, stocks and evidences of debt, provided that the total debts, obligations and securities of such new or reorganized company or companies exclusive of bonds, obligations, stocks and other securities that may be issued or authorized for additional capital shall not exceed the debts, obligations, stocks and other securities of the existing company or companies, and provided, further, that from and after its organization and the issue of such bonds, obligations, stocks and other securities are hereby permitted, all the provisions of this act shall apply to such new or reorganized company or companies. *Laws 1911, No. 325, sec. 59.*

Wisconsin. Any person or association of persons, which shall have, or may hereafter become the owner or assignee of the rights, powers, privileges, and franchise of any public service corporation, created or organized by or under any law of this state, by purchase under a mortgage sale, sale in bankrupt proceedings, or sale under any judgment, order, decree, or proceedings of any court in this state, including the courts of the United States sitting herein, must, within 60 days after such purchase or assignment, organize anew by filing articles of organization as provided by law respecting corporations for similar purposes, and thereupon shall have the rights, privileges and franchises which such corporation had, or was entitled to have, at the time of such purchase and sale, and such as are provided by those statutes applicable thereto. The new organization may issue stock, certificates of stock and bonds for the property of the former corporation thus acquired, in an amount not to exceed the true value of such property, as found and determined by the commission, and stated in the certificate of authority issued to such corporation, in accordance with the provisions of subsections 5 and 6 of section 1753-9 of the statutes. *Laws 1911, ch. 593, sec. 1753-11 (1).*

K. UNAUTHORIZED ISSUES VOID.

Arizona, California. All stock and every stock certificate, and every bond, note or other evidence of indebtedness of a public utility,¹ issued without an order of the commission authorizing the same then in effect shall be void, and likewise all stock and every stock certificate, and every bond, note or other evidence of indebtedness, of a public utility,¹ issued with the authorization of the commission, but not conforming in its provisions to the provisions, if any, which it is required by the order of authorization of the commission to contain shall be void; but no failure in any other respect to comply with the terms or conditions of the order of authorization of the commission shall render void any stock or stock certificate, or any bond, note or other evidence of indebtedness, except as to a corporation or person taking the same otherwise than in good faith and for value and without actual notice. *Ariz. Session Laws 1912, ch. 90, sec. 52 (d); Cal.—Stats. 1911, ch. 14, sec. 52 (d).*

All stocks and stock certificates, and bonds, notes and other evidences of indebtedness issued by any public utility¹ after this act takes effect, upon the authority of any articles of incorporation or amendments thereto or vote of the stockholders or directors filed, taken or had, or other proceedings taken or had previous to the taking effect of this act shall be void, unless an order of the commission authorizing the issue of such stocks or stock certificates, or bonds, notes or other evidence of indebtedness shall have been obtained from the commission prior to such issue. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. *Ariz.—Same, sec. 52 (h); Cal.—Same, sec. 52 (h).*

Kansas. Any issue of stocks, certificates, bonds, notes or other evidences of indebtedness, not payable within one year which shall be issued by such public utility or common carrier contrary to the provisions of this act, shall be void. *Laws 1911, ch. 238, sec. 25.*

Ohio. All stocks, bonds, notes or other evidence of indebtedness issued by any public utility or railroad without the consent or permission of the commission, as herein provided, shall be void and of no effect. *Laws 1911, No. 325, sec. 58.*

Texas. Every certificate of stock in any railroad company and every bond and other evidence of debt operating as a lien upon the property of such railroad company, which shall be made, issued or sold without a compliance with this chapter, shall be void. *Sayles' Civ. Stats. 1896, art. 4584 (k).*

¹ "Public service corporation," in Arizona.

Wisconsin. All stocks, certificates of stock, bonds, notes and other evidences of indebtedness of any public service corporation, issued contrary to the provisions of this act, shall be void. *Laws 1911, ch. 593, sec. 1753-7.*

All stocks, certificates of stock, bonds, notes, or other evidences of indebtedness issued or delivered by any public service corporation, after this act takes effect, upon the authority of any articles of incorporation or amendments thereto or vote of the stockholders or directors filed, taken or had previous to the taking effect of this act, shall be void unless the certificate provided for by this act shall have been obtained from the commission prior to such issue or delivery. The burden of proof shall be upon any party claiming any exemption under this act. *Same, sec. 1753-19.*

L. APPLICATION OF PROCEEDS OF ISSUES.

Arizona, California. No public utility¹ shall, without the consent of the commission apply the issue of any stock or stock certificate or bond, note or other evidence of indebtedness, or any part thereof, or any proceeds thereof to any purpose not specified in the commission's order or to any purpose specified in the commission's order, in excess of the amount authorized for such purpose, or issue or dispose of the same on terms less favorable than those specified in such order, or a modification thereof. *Ariz.—Session Laws 1912, ch. 90, sec. 52 (b); Cal.—Stats. 1911, ch. 14, sec. 52 (a).*

Kansas. No corporation engaged in the business of a common carrier shall apply the proceeds of any such stocks, certificates of stock, bonds or other evidences of indebtedness to any other purpose or issue the same on any less favorable terms than that specified in the certificate issued by the commission, unless by permission of commission. *Gen. Stats. 1909, as amended, sec. 7067.*

Massachusetts. A company which is within the provisions of this section shall not apply the proceeds of such stock or bonds or coupon notes or other evidences of indebtedness as aforesaid, to any purpose not specified in such certificate. *Rev. Laws 1902, ch. 109, sec. 24 (gas, electric light, aqueduct and water companies and corporations for transmitting intelligence by electricity). Acts 1906, ch. 463, pt. II, sec. 65 (railroad corporation), sec. 107 (street railway company).*

New Hampshire. No railroad corporation or public utility shall apply the proceeds of any stock, bonds or notes to any other purpose than those specified in the order of the commission authorizing the issue of the same. *Laws 1911, ch. 164, sec. 14(a).*

New York, Ohio. Such corporation shall not, without the consent of the commission, apply said issue or any proceeds thereof, to any purpose not specified in such order. *N. Y.—Laws 1910, ch. 480, sec. 55 (common carrier, railroad and street railroad corporations), sec. 69 (gas, and electrical corporations), sec. 101 (1) (telegraph and telephone corporations); Ohio—Laws 1911, no. 325, sec. 58.*

Wisconsin. Such corporation shall not apply the proceeds of such stock, bonds, notes or other evidences of indebtedness as aforesaid (issued for money only) to any purposes not specified in such certificate, nor issue such stock, bonds, notes or other evidences of indebtedness on any terms not specified in such certificate. *Laws 1911, ch. 593, sec. 1753-9 (3).*

Such corporation shall not apply the proceeds of the sale of such stock, bonds, notes, or other evidences of indebtedness as aforesaid to any purpose not specified

¹ "Public service corporation" in Arizona.

in such certificate, nor issue such stock, bonds, notes, or other evidences of indebtedness on any terms not specified in such certificate, and no property, services, or other consideration than money shall be taken in payment to the corporation for such stock, certificates of stock, bonds, notes or other evidences of indebtedness, except at the true value of such property, services, or other consideration than money, as found and determined by the commission and stated in said certificate. *Same, sec. 1753-9(7).*

M. DUTY OF UTILITIES TO ACCOUNT TO COMMISSION FOR DISPOSITION OF PROCEEDS.

Arizona, California. The commission shall have the power to require public utilities¹ to account for the disposition of the proceeds of all sales of stocks and stock certificates, and bonds, notes and other evidences of indebtedness, in such form and detail as it may deem advisable, and to establish such rules and regulations as it may deem reasonable and necessary to insure the disposition of such proceeds for the purpose or purposes specified in its order. *Ariz.—Session Laws 1912, ch. 90, sec. 52(c); Cal.—Stats. 1911, ch. 14, sec. 52(c).*

New Hampshire. Every railroad corporation and public utility issuing stocks, bonds or other evidence of indebtedness subject to the provisions of this section, shall file with the commission an account showing in such detail as the commission shall require the disposition of the proceeds of such issue. *Laws 1911, ch. 164, sec. 14 (a).*

Wisconsin. The commission shall have the power to require public service corporations to account for the disposition of the proceeds of all sales of stocks, certificates of stock, bonds, notes, and other evidences of indebtedness, issued pursuant to this act, in such form and detail as it may deem advisable, and to do and perform any and all acts necessary to carry out the provisions of this act. *Laws 1911, ch. 593, sec. 1753-13.*

N. CERTIFICATE OF AUTHORIZATION REQUIRED TO BE RECORDED.

Kansas. No common carrier or public utility shall issue any stock, certificates, bonds, notes or other evidences of indebtedness for money, property or services, either directly or indirectly, nor shall it receive any money, property or services in payment of the same, either directly or indirectly, until there shall have been recorded upon the books of such corporation the certificate of the commission herein provided for. *Laws 1911, ch. 238, sec. 34.*

Wisconsin. No public service corporation shall issue any stocks, certificates of stock, bonds, notes or other evidences of indebtedness for money, property or services, either directly or indirectly, until there shall have been recorded upon the books of such corporation the certificate of commission herein provided for. *Laws 1911, ch. 593, sec. 1753-12.*

O. CONTRACT FOR CONSOLIDATION OR LEASE SHALL NOT BE CAPITALIZED.

Arizona, California, Maryland, Nebraska. No contract for consolidation or lease shall be capitalized, nor shall any public utility² hereafter issue any bonds, notes or

¹ "Public service corporation," in Arizona.

² "Public service corporation," in Arizona; "corporation," in Maryland and Nebraska.

other evidences of indebtedness against or as a lien upon any contract for consolidation or merger. *Ariz.—Session Laws 1912, ch. 90, sec. 52 (b)*; *Cal.—Stats. 1911, ch. 14, sec. 52 (a)*; *Md.—Laws 1910, ch. 180, sec. 27* (common carrier, railroad and street railroad corporations), *sec. 34* (gas and electrical corporation); *Neb.—Laws 1909, ch. 108, sec. 1*.

New Jersey. No public utility shall capitalize any contract for consolidation, merger or lease; issue any bonds or other evidence of indebtedness against or as a lien upon any contract for consolidation, merger or lease; provided, however, that the provisions of this section shall not prevent the issuance of stock, bonds or other evidence of indebtedness subject to the approval of commission by any lawfully merged or consolidated public utilities not in contravention of the provisions of this section. *Laws 1911, ch. 195, sec. 18 (f)*.

New York, Ohio. Identical with Maryland provision. *N. Y.—Laws 1910, ch. 480, sec. 55* (common carrier, railroad and street railroad corporations), *sec. 69* (gas and electrical corporations), *sec. 101* (telegraph and telephone corporations); *Ohio—Laws 1911, no. 325, sec. 62*.

P. FRANCHISES NOT TO BE CAPITALIZED.

Arizona, California. The commission shall have no power to authorize the capitalization of the right to be a corporation, or to authorize the capitalization of any franchise or permit whatsoever, or the right to own, operate or enjoy any such franchise or permit in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to a political subdivision thereof as a consideration for the grant of such franchise, permit or right. *Ariz.—Session Laws 1912, ch. 90, sec. 52(b)*; *Cal.—Stats. 1911, ch. 14, sec. 52 (a)*.

Maryland, Nebraska. The commission shall have no power to authorize the capitalization of any franchise to be a corporation, or to authorize the capitalization of any franchise or right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to a political subdivision thereof as a consideration for the grant of such franchise or right. *Md.—Laws 1910, ch. 180, sec. 27* (common carrier, railroad and street railroad corporations), *sec. 34* (gas and electrical corporations), *sec. 41* (telephone and telegraph companies), *sec. 42* (water, heat, refrigerator and power companies), *Neb.—Laws 1909, ch. 108, sec. 1*.

New Jersey. No public utility shall capitalize any franchise to be a corporation; capitalize any franchise in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or any political subdivision thereof as a consideration of such franchise. *Laws 1911, ch. 195, sec. 18(f)*.

New York. Identical with Maryland provision. *Laws 1910, ch. 480, sec. 55* (common carrier, railroad and street railroad corporations), *sec. 69* (gas and electrical corporations), *sec. 101* (telegraph and telephone corporations),

Ohio. The commission shall not have power to authorize the capitalization of any franchise or right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as the consideration for the grant of such franchise or right. *Laws 1911, no. 325, sec. 62*.

Wisconsin. In determining the value of the property of a public service corporation or any person furnishing service to the public for the purposes of this act, no

franchise to be a corporation and no franchise or privilege granted to such corporation by the state or a municipality shall be appraised, fixed or considered at any greater sum or value than the sum paid therefor into the public treasury of the state or the municipality granting the same. *Laws 1911, ch. 593, sec. 1753-15.*

Q. CAPITAL OF CONSOLIDATED CORPORATION.

Maryland. The capital stock of corporations formed by the merger or consolidation of two or more other corporations shall not exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash. *Laws 1910, ch. 180, sec. 27 (common carrier, railroad and street railroad corporations), sec. 34 (gas and electrical corporations).*

Massachusetts. When a gas company incorporated under the laws of Massachusetts consolidates with any other gas company or companies, or an electric light company incorporated under the laws of Massachusetts consolidates with any other such electric light company or companies, or any such gas company or companies consolidates with any such electric light company or companies, the aggregate amount of the capital stock and the aggregate amount of the debt of the consolidated companies shall not by reason of such consolidation be increased. *Acts 1906, ch. 382, sec. 1.*

NOTE.—The force of this section seems to have been modified by special legislation.

Nebraska, New York. Identical with Maryland provision. *Neb.—Laws 1909, ch. 108, sec. 1; N.Y.—Laws 1910, ch. 480, sec. 55 (common carrier, railroad and street railroad corporations) sec. 69 (gas and electrical corporations) sec. 101 (telegraph and telephone corporations).*

Ohio. The aggregate amount of the debt of consolidated companies by reason of such consolidation shall not be increased, nor shall the capital stock of a corporation formed by the merger or consolidation of two or more corporations exceed the sum of the capital stock of the corporation or corporations so consolidated or merged at the par value thereof, and such sum or any additional sum actually paid in cash. *Laws 1911, No. 325, sec. 62.*

R. MANNER IN WHICH RAILROADS AND STREET RAILWAYS MAY INCREASE CAPITAL ISSUES FOR SPECIAL PURPOSES DESIGNATED.

Maine. Any railroad desiring to change the gauge of its road shall by vote increase its capital stock to the amount required by section 1 of this chapter if the existing capital be not equal to such amount, and shall present to commission a written application subscribed and sworn to by a majority of its directors, setting forth the desire of the petitioners, and that the increased amount of capital stock has been in good faith subscribed by responsible persons, and that five per cent thereof has been paid, in cash, to the treasurer of such corporation. If such application be approved by commission such corporation shall make and file a new location as provided by section 8 of this chapter. *Rev. Stats, 1903, as amended, ch. 51, sec. 9.*

A railroad corporation for the purpose of building a branch railroad track which it is or may be authorized to build, or of building a branch or extension which it is or may be authorized to build, or of aiding in the construction of another railroad pursuant to law, or of building stations, or of abolishing grade crossings, or of making permanent improvements, or of paying its floating debt, or of paying its funded debt, or for payment of money borrowed for any lawful purpose, or for the purchase of shares of the capital stock of any railroad corporation whose railroad is leased to or

operated by it, or for the purchase of shares of the capital stock of any railroad corporation of which capital stock it owns a majority, or for improving the alignment of its road, or for acquiring land for and laying new tracts, or for other necessary and lawful purposes not named in section five, from time to time, with the approval of commission, as hereinafter provided, may increase its capital stock beyond the amount fixed by law by issuing common or preferred stock, provided such increase shall first be authorized by vote of a majority of stock, present or represented, at a legal meeting of the corporation duly called for that purpose. If preferred stock be issued the character of such stock, including its voting power, if any, and the rate of interest it shall bear and whether it shall be cumulative or non-cumulative, shall be fixed by vote of the majority of stock present or represented at such legal meeting. *Same, sec. 19.*

Upon petition of the directors of a railroad corporation to commission, the amount of such increase, after such notice by publication as commission shall order, and after hearing, shall be determined by commission who shall within 30 days after final hearing of said petition file in the office of the secretary of state a certificate showing the amount of increase authorized and the purposes for which the proceeds of said new stock may be used; and the company shall not apply such increase or the proceeds thereof to any purpose not specified in said certificate, and may be enjoined from so doing by any justice of the supreme judicial court upon application of commission or of any interested party. *Same, sec. 20.*

New Hampshire. A railroad corporation for the purpose of building a branch or extension of its railroad, or of aiding in the construction of another railroad, or of taking stock in an elevator corporation and erecting and operating elevators upon its own road and upon those leased to or operated by it, or of building depots or of abolishing grade crossings or of building or purchasing power houses, shops or other structures and machinery or equipment for the same, or of making permanent improvements or additions to its plant, rolling stock or appliances, or of purchasing the shares of the capital stock of any railroad corporation whose railroad property is leased to or to be operated by it, or of any other railroad corporation a majority of the capital stock of which is owned by the purchasing road, or of paying or refunding its funded debt, or of paying floating indebtedness or money borrowed, where such debt or indebtedness was created or the money used for any of the purposes hereinbefore enumerated, may from time to time, with the authority of the commission as herein provided, increase its capital stock or bonds beyond the amounts fixed and limited by its articles of association or its charter, or by any act of the general court, provided that such increase shall first be authorized by the vote of a majority of the stockholders present at any meeting of the corporation duly called for that purpose. *Laws 1911, ch. 164, sec. 14(b).*

New York. Subject to the limitations and requirements of this chapter and of the public service commissions law every railroad corporation, in addition to the powers given by the general and stock corporation laws, shall have power from time to time to borrow such sums of money as may be necessary for completing and finishing or operating or improving its railroad, or for any other of its lawful purposes and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its property and franchises to secure the payment of any debts contracted by the company for the purposes aforesaid, notwithstanding any limitation on such power contained in any general or special law. But no mortgage, except purchase-money mortgages, shall be issued by any railroad corporation under this chapter or any other law without the consent of the public service commission, and the consent of the stockholders owning at least two-thirds of the stock of the corporation, which consent shall be in writing, and shall be given and certified and be filed and recorded in the office of the clerk or registrar of the county where it has its principal place of business, as provided in section six of the stock corporation law; or else the consent of the public

service commission and the consent by their votes of stockholders owning at least two-thirds of the stock of the corporation which is represented and voted upon in person or by proxy at a meeting called for that purpose upon a notice stating the time, place and object of the meeting, served at least three weeks previously upon each stockholder personally, or mailed to him at his post office address, and also published at least once a week for three weeks successively in some newspaper printed in the city, town or county where such corporation has its principal office, and a certificate of the vote at such meeting shall be signed and sworn to and shall be filed and recorded as provided by section six of the stock corporation law. When authorized by the stockholders' consent to any bonds made or issued under this section, the directors, under such regulations as they may adopt, may confer on the holder of any such bonds the right to convert the principal thereof, after two and not more than twelve years from the date of the bond, into stock of the corporation at a price fixed by the board of directors, which may be either par or a price not less than the market value thereof at the date of such consent to such bonds; and if the capital stock shall not be sufficient to meet the conversion when made, the board of directors shall authorize an increase of capital stock sufficient for that purpose. *Laws 1910, ch. 481, sec. 8(10).*

Any railroad company incorporated under chapter 140, of the laws of 1850 entitled 'An act to authorize the formation of railroad corporations and to regulate the same,' and acts amendatory thereof and supplementary thereto, may change the gauge of its road on consent of the public service commission and approval of the stockholders of said railroad company owning three-fourths in amount of the capital stock, said approval of said stockholders to be made at a special meeting of the stockholders of said company called for that purpose; and upon like consent of said commission, and upon like approval of the stockholders of said railroad company owning three-fourths in amount of the said capital stock of said company, the floating and bonded indebtedness of said railroad company may be increased to an amount necessary to make such change of gauge and to provide for the operating expenses of said railroad, notwithstanding restrictions or limitations contained in the original certificate of incorporation of said railroad company. *Same, sec. 25.*

Rhode Island. The several street railway companies in this state accepting the provision of this chapter may hereafter increase their capital stock from time to time to meet the costs and expenditures actually made for extensions and for new construction and equipment, and the cost of such extensions or improvements shall be certified by the railroad commissioner, and all issues of capital stock for such purpose shall be subject to the approval of such officer. *Gen. Laws 1909, ch. 216, sec. 4.*

Wisconsin. The capital stock of any such corporation may be increased to such an amount as may by its stockholders be deemed necessary for the purchase or construction of any railroad which it may be legally empowered to purchase or construct, for additions to, or improvements of, its railroad or property for additional equipment which may be necessary in the operation of its railroad, for real estate that may be needed by said corporation for railway purposes, and for the purchase, construction, and equipment of any extension, branch, or addition to any railroad, the capital stock of which is owned or held in trust for said corporation, by a majority vote of all its stock, in person or by proxy at any annual meeting or at any meeting called by its directors for that purpose, by a notice in writing to each stockholder, to be served on him personally or by depositing the same in the post office, postage paid, properly directed to him at the post office nearest his usual place of residence, at least twenty days prior to such meeting. Such notice shall state the time and place of such meeting, its object, and the amount to which it is proposed to increase such capital stock. No vote in favour of such increase shall take effect until the proceedings of such meeting showing the names of all the stockholders voting therefor and the amount

of stock owned by each, shall be entered upon the records of such corporation nor until the railroad commission shall have issued its certificate that such increase of stock is reasonably necessary to accomplish the objects of the incorporation of such railroad company. Every such corporation, so increasing its capital stock, shall file with the secretary of state, whenever issues of stock shall be made under this section, a report showing the amount issued and the purposes to which it has been, or is to be, devoted, which report shall be verified by the oath of the president or the general manager thereof, and of the chief engineer. *Laws 1909, ch. 530, sec. 1826.*

S. STOCK OR SCRIPT DIVIDENDS.¹

Kansas, Ohio. No common carrier or public utility shall declare any stock, bond or script dividend or divide the proceeds of the sale of any stocks, bond or script among its stockholders unless authorized by commission so to do. *Kas.—Laws 1911, ch. 288, sec. 35; Ohio—Laws 1911, No. 325, sec. 61 (public utility or railroad).*

T. SALE OF STOCK TO STOCKHOLDERS AND AUCTION CLAUSE.

Maine. Whenever a railroad corporation which is in actual possession of and operating a railroad increases its capital stock under the provisions of the preceding section,² the new shares shall be offered proportionately to its stockholders at such price, not less than the par value thereof, as shall be determined by its stockholders. The directors, upon the approval of such increase as provided in the preceding section, shall cause written notice of such increase to be given to each stockholder of record upon the books of the company at the date of the vote to increase, stating the amount of the increase, the number of shares or fraction of shares to which, according to the proportionate number of his shares at the date of the vote to increase, he is entitled, the price at which he is entitled to take them, and fixing a time not less than 15 days after the date of such vote to increase within which he may subscribe for such additional stock. Each stockholder may, within the time limited, subscribe for his portion of such stock, which shall be paid for in cash before the issue of a certificate therefor. Provided, when the increase in the capital stock does not exceed four per cent of the existing capital stock of the corporation, the directors, without first offering the same to the stockholders, may sell the same at auction to the highest bidder at not less than the par value thereof. If, after the expiration of the notice above provided for, any shares of such stock remain unsubscribed for by the stockholders entitled to take them the directors may sell the same at auction. All shares of stock to be disposed of at auction under the provisions of this section shall be offered for sale to the highest bidder in the city of Boston, or in such city or town as may be prescribed by commission; and notice of the time and place of such sale shall be published at least five times during the ten days immediately preceding the time fixed for the sale, in such daily newspapers, not less than three in number, as may be prescribed by the commission. No share shall be sold or issued for a less sum, to be actually paid in cash, than the par value thereof. Provided further, that the determination by the commission, under the provisions of the preceding section as to the amount of such increase, shall be based upon the price at which such stock is to be issued as fixed by the stockholders, and also provided that said commission shall refuse to approve any particular issue of stock if, in their opinion, the price fixed by the stockholders is so low as to be inconsistent with the public interest. *Rev. Stats. 1903, ch. 51, sec. 21, as amended by Acts 1909, ch. 32.*

¹ The laws of many states prohibit stock or script dividends. The Kansas and Ohio legislation is peculiar because it appears to confer discretionary power on the commissions.

² *Rev. Stats. 1903, ch. 51, sec. 20.* See Topic R, herewith.

Massachusetts. If a corporation which owns or operates a railroad or street railway, a gas light, electric light, aqueduct or water company, or a corporation which is established for and is engaged in the business of transmitting intelligence by electricity, increases its capital stock, such new shares as are necessary to produce the amount of increased capital stock which has been authorized shall, except as provided in the following section, be offered proportionately to its stockholders at not less than the market value thereof at the time of increase, to be determined by the railroad commission in the case of a railroad corporation or street railway company, by the gas and electric light commission in the case of a gas light or electric light company, and by the commissioner of corporations in the case of an aqueduct or water company or of a corporation which is established for and is engaged in the business of transmitting intelligence by electricity, taking into account previous sales of stock of the corporation and other pertinent conditions, which determination shall be in writing and with the date thereof shall be certified to and recorded in the books of the corporation. The directors, upon the approval of such increase as provided in section 24¹ and the determination of the market value as hereinbefore provided, shall cause written notice of such increase to be given to each stockholder who was such at the date of the vote to increase, stating the amount of such increase, the number of shares or fractions of shares to which he, according to the proportionate number of his shares at the date of such vote, is entitled, the price at which he is entitled to take them, and fixing a time, not less than 15 days after the date of such determination, within which he may subscribe for such additional stock. Each stockholder may, within the time limited, subscribe for his portion of such stock, which shall be paid for in cash before the issue of a certificate therefor. *Rev. Laws 1902, ch. 109, sec. 30.*²

If the increase in the capital stock which is subject to the provisions of the preceding section does not exceed four per cent of the existing capital stock of the corporation, the directors, without first offering the same to the stockholders, may, and if, after the expiration of the time limited in the notice required by the preceding section, any shares remain unsubscribed for by the stockholders entitled to take them, the directors shall sell them by auction to the highest bidder at not less than the par value thereof to be actually paid in cash. Such shares shall be offered for sale in the city of Boston or in such other city or town as may be prescribed by commission; and notice of the time and place of such sale shall be published at least five times during the ten days immediately preceding the sale in each of at least three of such daily newspapers as may be prescribed by such commission. No shares shall be sold or issued under this or the preceding section for a less amount to be actually paid in cash than the par value thereof. *Same, sec. 31.*²

Whenever the company shall issue additional stock, it shall be the duty of the gas and electric light commission in deciding what amount of new stock is to be authorized, to place a value upon such new stock, which value shall be stated in their written decision, and before offering the new shares to the existing shareholders of the company, the company shall offer the new shares for sale by public auction in the city of Boston, in such manner at such times, and subject to such conditions of sale as the company shall from time to time determine, subject however, to the approval of the gas and electric light commission: provided, that no bid at any such auction shall be accepted for a price less than the value placed upon the stock by the gas and electric light commission as aforesaid; and provided, further, that notice of the proposed sale of said stock by public auction together with the terms and conditions of sale shall be published in at least three newspapers in the city of Boston twice a week for not less than three successive weeks before the day of auction. *Acts .1906, ch. 422, sec. 7.*¹

¹ Rev. Laws 1902, ch. 109, sec. 24. See Topic C herewith.

² Sections 30 and 31 are repealed so far as they apply to railroads or railroad corporations and to street railways or street railway companies.

When any stock which has been offered for sale by auction is not sold, the same shall be offered at the price so placed upon it by the gas and electric light commission to the stockholders of the company, in accordance with the provisions of section 30 of chapter 109 of the revised laws; provided, that any stock so offered and not accepted by the stockholders shall again be offered for sale by public auction, in accordance with the provisions of section 31 of chapter 109 of the revised laws; and provided, further, that if the new stock authorized does not exceed four per cent of the existing capital stock of the company the same may be sold in accordance with the provisions of said section 31 without being first offered to the stockholders. *Same, sec. 8.*¹

If a corporation which owns or operates a railroad increases its capital stock, such new shares as are necessary to produce the amount of increased capital stock which has been authorized shall, except as provided in the following section, be offered proportionately to its stockholders at such price not less than the market value thereof at the time of increase, as may be determined by the railroad commission, taking into account previous sales of stock of the corporation and other pertinent conditions, which determination shall be in writing and with the date thereof shall be certified to and recorded in the books of the corporation. The directors, upon the approval of such increase as provided in section 65,¹ and the determination of the market value as hereinbefore provided, shall cause written notice of such increase to be given to each stockholder of record upon the books of the corporation at the close of business on the date of such determination by commission, stating the amount of such increase, the number of shares or fractions of shares to which he, according to the proportionate number of his shares at the date of such determination, is entitled, the price at which he is entitled to take them, and fixing a time, not less than 15 days after the date of such determination by commission, within which he may subscribe for such additional stock. Each stockholder may, within the time limited, subscribe for his portion of such stock, which shall be paid for in cash before the issue of a certificate therefor. *Acts 1906, ch. 463, pt. ii, sec. 69.*

If the increase in the capital stock which is subject to the provisions of the preceding section does not exceed four per cent of the existing capital stock of the corporation, the directors, without first offering the same to the stockholders may sell them by auction to the highest bidder at not less than the par value thereof to be actually paid in cash. They may also so sell at public auction any shares, which, after the expiration of the time limited in the notice required by the preceding section, remain unsubscribed for by the stockholders entitled to take them. Such shares shall be offered for sale in the city of Boston, or in such other city or town as may be prescribed by the railroad commission; and notice of the time and place of such sale shall be published at least five times during the ten days immediately preceding the sale in each of at least three of such daily newspapers as may be prescribed by commission. No shares shall be sold or issued under this or the preceding section for a less amount to be actually paid in cash than the par value thereof. *Same, sec. 70.*

If a company which owns or operates a street railway increases its capital stock,² such new shares as are necessary to produce the amount of increased capital stock

¹ Boston Sliding Scale Act.

² Acts 1906, ch. 463, pt. II, sec. 65. See Topic D herewith.

² Acts 1906, Chapter 463, Part III, section 103, authorizes a street railway company, for the purposes therein specified, to increase its capital stock or issue bonds secured by mortgage or otherwise to such an amount beyond the amounts fixed and limited by its agreement of association or its charter or by any special law, as the railroad commission shall determine to be required for the purposes specified and shall approve for such purposes, in accordance with the provisions of sections 107, 108, 111 and 112 of Part III, and of sections 48 to 56, inclusive of Part II.

Sections 48 to 56 of Part II, prescribe the manner in which railroad corporations for the purposes therein specified may, in accordance with the provisions of sections 65 and 66 of Part II, issue coupon or registered bonds, coupon notes or other evidences of indebtedness payable at periods of more than 12 months from the date thereof.

Under Laws 1909, ch. 485, sec. 1, street railway companies, for the purpose of supplying themselves with working capital, in addition to the purposes for which such companies may increase their capital stock or issue bonds as provided in section 103, of Part III, of Chapter

which has been authorized shall, except as provided in the following section, be offered proportionately to its stockholders at such price not less than the market value thereof at the time of increase, as may be determined by the railroad commission, taking into account previous sales of stock of the company and other pertinent conditions, which determination shall be in writing and with the date thereof shall be certified to and recorded in the books of the company. The directors upon the approval of such increase as provided in section 107,¹ and the determination of the market value as hereinbefore provided, shall cause written notice of such increase to be given to each stockholder of record upon the books of the company at the close of business on the date of such determination by commission, stating the amount of such increase, the number of shares or fractions of shares to which he, according to the proportionate number of his shares at the date of such determination, is entitled, the price at which he is entitled to take them, and fixing a time, not less than 15 days after the date of such determination by commission, within which he may subscribe for such additional stock. Each stockholder may, within the time limited, subscribe for his portion of such stock, which shall be paid for in cash before the issue of a certificate therefor. *Acts 1906, ch. 463, pt. iii, sec. 111.*

If the increase in the capital stock which is subject to the provisions of the preceding section does not exceed four per cent. of the existing capital stock of the company, the directors, without first offering the same to the stockholders, may sell them by auction to the highest bidder at not less than the par value thereof to be actually paid in cash. They may also so sell at public auction any shares, which, after the expiration of the time limited in the notice required by the preceding section, remain unsubscribed for by the stockholders entitled to take them. Such shares shall be offered for sale in the city of Boston, or in such other city or town as may be prescribed by the railroad commission; and notice of the time and place of such sale shall be published at least five times during the ten days immediately preceding the sale in each of at least three of such daily newspapers as may be prescribed by commission. No shares shall be sold or issued under this or the preceding section for a less amount to be actually paid in cash than the par value thereof. *Same, sec. 112.*

Any railroad, street railway, electric railroad or elevated railway company which is in actual possession of and operating a railroad or railway shall, upon any increase of its capital stock, except as provided in the following section, offer the new shares proportionately to its stockholders at such price not less than the par value thereof as may be determined by its stockholders. The directors upon the approval of such increase, as provided in section 65¹ of part II and section 107² of part III of chapter 463 of the acts of 1906, shall cause written notice of such increase to be given to each stockholder of record upon the books of the company at such date as shall be designated by vote of the directors passed after the approval by the commission of such issue, stating the amount of the increase, the number of shares or fractions of shares to which, according to the proportionate number of his shares at said date designated by vote of the directors, he is entitled, the price at which he is entitled to take them, and fixing a time not less than 15 days after said date designated by vote of the direc-

463, of Acts 1906, may, in accordance with the provisions of sections 107, 108, 110, 111, and 112 of Part III. of said chapter, or of Chapter 636 of Acts 1903, as amended by Chapter 369 of Acts 1909, and of sections 48 to 56 of Part II. of Chapter 463 of Acts 1906, increase their capital stock to an amount not exceeding five per cent of the par value of their capital stock then outstanding, or may issue bonds to an amount not more than the Railroad Commission shall determine will be properly required for such purpose and as commission shall approve as being consistent with the interests of the public and of the stockholders and as not unreasonably reducing the security of any bond previously issued, beyond the amounts fixed and limited by their agreement of association or by the provisions of any general or special law.

For sections 107 and 108 of Part III. and sections 65 and 66 of Part II, see Topic C herewith; for section 110 of Part III, see Topic U herewith.

¹ Acts 1906, ch. 463, pt. iii, sec. 107. See Topic C herewith.

² Acts 1906, ch. 463, pt. ii, sec. 65. See Topic D, herewith.

³ Acts 1906, ch. 463, pt. iii, sec. 107. See Topic C. herewith.

tors within which he may subscribe for such additional stock. Each stockholder may within the time limited subscribe for his portion of such stock, which shall be paid for in cash before the issue of a certificate therefor. *Acts 1908, ch. 636, sec. 1, as amended.*

If the increase in the capital stock which is subject to the provisions of the preceding section does not exceed four per cent of the existing capital stock of the company, the directors, without first offering the same to the stockholders, may sell shares by auction to the highest bidder, at not less than the par value thereof, to be actually paid in cash. They may also so sell at public auction any shares, which, after the expiration of the time limited in the notice required by the preceding section, remain unsubscribed for by the stockholders entitled to take them. Such shares shall be offered for sale in the city of Boston, or in such other city or town as may be prescribed by the railroad commission; and notice of the time and place of such sale shall be published at least five times during the ten days immediately preceding the sale in each of at least three of such daily newspapers as may be prescribed by commission. No shares shall be sold or issued under this or the preceding section for a less amount to be actually paid in cash than the par value thereof. *Same, sec. 2.*

The determination by the railroad commission, under the provisions of section 65¹ of said part II and section 107² of said part III, as to the amount of stock which is reasonably necessary for the purpose for which such stock has been authorized shall, in the case of the corporations described in this act, be based upon the price at which such stock is to be issued as fixed by the stockholders: Provided, that the board shall refuse to approve any particular issue of stock if, in the opinion of the board, the price fixed by the stockholders is so low as to be inconsistent with the public interest. *Same, sec. 3.*

A gas or electric light company shall, upon any increase of its capital stock, except as provided in the following section, offer the new shares proportionately to its stockholders at such price, not less than the par value thereof, as may be determined by its directors. The vote of the gas and electric light commission, as provided in section 24³ of chapter 109 of the revised laws, as to the amount of stock which is reasonably necessary for the purpose for which such increase has been authorized shall be based on the price fixed as hereinbefore provided, unless commission is of opinion that such price is so low as to be inconsistent with the public interest, in which case it may determine the price at which such shares may be issued. No application for an issue of stock under said section 24³ shall be made unless authorized by vote of the stockholders passed not more than four months prior to such application, but the vote of the stockholders to increase the capital stock may be passed before or after the action of commission under said section 24³. All votes and proceedings relative to the increase and all rights of the stockholders to subscribe for the new shares shall become void unless the directors, after the vote to increase the capital stock and within 60 days after the final action of the board, shall cause written notice of such increase to be given as provided by law. *Acts 1909, ch. 477, sec. 1, as amended by Acts 1910, ch. 374.*

If the increase in the capital stock which is subject to the provisions of the preceding section does not exceed four per cent of the existing stock of the company, the directors, without first offering the same to the stockholders, may sell the shares by auction or by tender to the highest bidder in such manner, at such times and upon such terms, not less than the par value thereof to be actually paid in cash, as the directors shall determine. They shall also so sell at public auction any shares which, under the preceding section remain unsubscribed for by the stockholders entitled to take them. Such shares shall be offered for sale in the city of Boston or in such other city or town as may be prescribed by the board of gas and electric light commissioners, and notice of the time and place of the sale shall be published at least

¹ Acts 1906, ch. 463, pt. ii, sec. 65. See Topic D, herewith.

² Acts 1906, ch. 463, pt. iii, sec. 107. See Topic C, herewith.

³ Rev. Laws 1902, ch. 109, sec. 24. See Topic C, herewith.

five times, during the ten days immediately preceding the sale, in each of at least three of such daily newspapers as may be prescribed by the said commissioners. No shares shall be sold or issued under this or the preceding section for a less amount to be actually paid in cash than the par value thereof. *Same, sec. 2.*

New Hampshire. Whenever a railroad corporation or public utility shall increase its capital stock it shall, except as hereinafter provided, offer the new shares proportionately to its stockholders at such price not less than the par value thereof as shall have been determined by its stockholders in their vote for the issue of the same. The directors shall cause written notice of the increase in capital stock to be given to each stockholder of record upon the books of the corporation at the date designated by the directors at a meeting following the order of the commission authorizing the issue, which notice shall state the amount of the increase, the number of shares or fractions of shares to which the stockholder is entitled, the price at which he is entitled to take them, and shall fix a time not less than 15 days after the date so designated by the directors within which he may subscribe therefor. Each stockholder may within the time so limited subscribe for his proportion of the new stock which shall be paid for in cash before the issue of a certificate. The determination by the commission of the amount of stock reasonably requisite for the purpose for which the issue is made shall be based upon the price at which such stock is to be offered to stockholders as fixed by the vote of the stockholders; provided, however, that the commission shall refuse to authorize any particular issue of stock if in its opinion the price fixed by the stockholders is so low as to be inconsistent with the public interests. *Laws 1911, ch. 164, sec. 14(c).*

When an increase in capital stock does not exceed four per cent of the existing capital stock of the corporation the directors may, without first offering the same to the stockholders, sell the new shares by public auction to the highest bidder at not less than par value to be actually paid in cash. If after the expiration of the notice to stockholders hereinbefore provided any shares of the new issue of stock remain unsubscribed by stockholders entitled to take them, the directors shall sell the same by public auction to the highest bidder at not less than par value to be actually paid in cash. All shares of stock to be disposed of by public auction to the highest bidder under the provisions of this act shall be offered for sale in such city or town as may be prescribed by the commission, and the notice of the time and place of sale shall be published at least five times immediately preceding the time fixed for the sale in such newspapers, not less than three in number, as may be prescribed by the commission. *Same, sec. 14(d).*

U. PENALTIES FOR VIOLATIONS OF CAPITALIZATION PROVISIONS.

Arizona, California. Every public utility¹ which, directly or indirectly, issues or causes to be issued, any stock or stock certificate, or bond, note or other evidence of indebtedness, in non-conformity with the order of the commission authorizing the same, or contrary to the provisions of this act, or of the constitution of this state, or which applies the proceeds from the sale thereof, or any part thereof, to any purpose other than the purpose or purposes specified in the commission's order, as herein provided, or to any purpose specified in the commission's order in excess of the amount of said order authorized for such purpose, is subject to a penalty of not less than \$500 nor more than \$20,000 for each offense. *Ariz.—Session Laws 1912, ch. 90, sec. 52(e); Cal.—Stats. 1911, ch. 14, sec. 52(e).*

Every officer, agent or employee of a public utility¹, and every other person who knowingly authorizes, directs, aids in, issues or executes, or causes to be issued or executed, any stock or stock certificate, or bond, note or other evidence of indebtedness, in non-conformity with the order of the commission authorizing the same, or contrary

¹ "Public service corporation," in Arizona.

to the provisions of this act, or of the constitution of this state, or who, in any proceeding before the commission, knowingly makes any false statement or representation or with knowledge of its falsity files or causes to be filed with the commission any false statement or representation, which said statement or representation so made, filed or caused to be filed may tend in any way to influence the commission to make an order authorizing the issue of any stock or stock certificate, or any bond, note or other evidence of indebtedness, or which results in procuring from the commission the making of any such order, or who, with knowledge that any false statement or representation was made to the commission, in any proceeding, tending in any way to influence the commission to make such order, issues or executes or negotiates, or causes to be issued, executed or negotiated any such stock or stock certificate, or bond, note or other evidence of indebtedness, or who, directly or indirectly, knowingly applies, or causes or assists to be applied the proceeds or any part thereof, from the sale of any stock or stock certificate, or bond, note or other evidence of indebtedness, to any purpose not specified in the commission's order, or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, or who, with knowledge that any stock or stock certificate, or bond, note or other evidence of indebtedness, has been issued or executed in violation of any of the provisions of this act, negotiates or causes the same to be negotiated, shall be guilty of a felony (and on conviction thereof shall be imprisoned in the state penitentiary for a term of not less than two years and not more than ten years—Arizona only). *Ariz.—Same, sec. 52(f); Cal.—Same, sec. 52(f).*

Kansas. Any common carrier or public utility governed by the provisions of this act, or any agent, director or officer thereof, who shall, directly or indirectly, issue or cause to be issued any stock, certificate of stock, bonds or other evidences of indebtedness contrary to the provisions of this act, or who shall apply the proceeds from the sale thereof to any purpose other than that specified in the certificate of the commission, as herein provided, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$500 and not more than \$5,000, or by imprisonment in the county jail not more than one year or by both such fine and imprisonment. *Laws 1911, ch. 238, sec. 26.*

Massachusetts. A director, treasurer or other officer or agent of a railroad corporation, who knowingly votes to authorize the issue of, or knowingly signs, certifies or issues, stock or bonds contrary to the provisions of sections 65¹ and 66,¹ or who knowingly votes to authorize the application, or knowingly applies the proceeds, of such stock or bonds contrary to the provisions of said sections, or who knowingly votes to assume or incur, or knowingly assumes or incurs in the name or behalf of such corporation, any debt or liability except for the legitimate purposes of the corporation, shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. *Acts 1906, ch. 463, pt. ii, sec. 68.*

A director, treasurer or other officer or agent of any corporation named in section 24¹ who knowingly votes to authorize the issue of, or knowingly signs, certifies or issues, stock or bonds contrary to the provisions of the four preceding sections, or who knowingly votes to authorize the application, or knowingly applies the proceeds, of such stock or bonds contrary to the provisions of said sections, or who knowingly votes to assume or incur, or knowingly assumes or incurs in the name or behalf of such corporation, any debt or liability except for the legitimate purposes of the corporation shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both such fine and imprisonment. *Rev. Laws 1902, ch. 109, sec. 28.*

A director, treasurer or other officer or agent of a street railway company who knowingly votes to authorize the issue of, or knowingly signs, certifies or issues, stock

¹ See Topic C, herewith.

or bonds contrary to the provisions of the three preceding sections,¹ or who knowingly votes to authorize the application, or knowingly applies the proceeds, of such stock or bonds contrary to the provisions of said sections, or who knowingly votes to assume or incur, or knowingly assumes or incurs in the name or behalf of such company, any debt or liability except for the legitimate purposes of the company shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment. *Acts 1906, ch. 463, pt. iii, sec. 110.*

Michigan. Any officer, director, agent or employee of any person, corporation or association, who shall cause to be issued any stocks, bonds, notes or other evidences of indebtedness payable at periods of more than 12 months after the date thereof or who shall in any way aid in the issue of such stocks, bonds, notes or other evidences of indebtedness, not authorized by the commission, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison not less than one year nor more than five years. *Pub. Acts 1909, No. 144, sec. 3.*

Nebraska. Every common carrier and public service corporation and all officers and agents of any common carrier or public service corporation shall obey, observe and comply with every order made by the commission, under the authority of this act, so long as the same shall be and remain in force. Any common carrier or public service corporation which shall violate any provisions of this act, or which fails, omits, or neglects to obey, observe or comply with any order or direction or requirement of the commission under the provisions of this act, shall forfeit to the people of the state of Nebraska, not to exceed the sum of \$5,000 for each and every offense; every violation of any such order or direction or requirement of this act, shall be a separate and distinct offense, and, in case of a continuing violation every day's continuance thereof shall be and be deemed to be a separate and distinct offense. *Laws 1909, ch. 108, sec. 2.*

Every officer and agent of any common carrier or public service corporation who shall violate, or who procures, aids or abets any violation by any such common carrier or corporation of any provision of this act, or who shall fail to obey and observe and comply with any order of the commission or any provision of an order of the commission under the terms of this act, or who procures, aids, abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, be deemed guilty of a felony and on conviction thereof, shall be punished by confinement in the penitentiary for a period of not less than one and not longer than ten years. *Same, sec. 3.*

Ohio. Any director, president, secretary, manager, officer or other official of any public utility or railroad who shall knowingly make any false statement to secure the issue of any stock, bond, note or other evidence of indebtedness, or who shall, by such false statement, procure the order of the commission for the issue of any stock, bond, note or other evidence of indebtedness, or issue with knowledge of such fraud, negotiate, or cause to be negotiated any such stock, bond, or other evidences of indebtedness in violation of this act, shall upon conviction thereof, be fined not less than \$500, or be imprisoned in the penitentiary for not less than one year or more than ten years. *Laws 1911, No. 325, sec. 60.*

Wisconsin. Any public service corporation as herein defined, or any agent, director or officer thereof, who shall directly or indirectly, issue or cause to be issued, any stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, contrary to the provisions of this act, or who shall apply the proceeds from the sale thereof to any purposes other than that specified in the certificate of the commission, as herein provided, shall forfeit and pay into the state treasury not less than \$500 nor more than \$10,000 for each offense. *Laws 1911, ch. 593, sec. 1753-17.*

¹ See Topic C, herewith.

Each and every director, president, secretary, or other official or agent of any such public service corporation, who shall make any false statement to secure the issue of any stock, certificates of stock, bond, note, or other evidence of indebtedness, or who shall by false statement knowingly made, procure of the commission the making of the certificate herein provided, or issue with knowledge of such fraud, negotiate, or cause to be negotiated any such bond or other issue, in violation of these statutes, shall be guilty of a felony and upon conviction thereof shall be punished by a fine of not less than \$500, or by imprisonment in the state prison for a term of not less than one nor more than ten years, or by both such fine and imprisonment in the discretion of the court. *Same, sec. 1753-18.*

APPENDIX H.

MODEL ACT REGULATING PUBLIC UTILITIES PREPARED BY THE NATIONAL CIVIC FEDERATION.

An Act Regulating Public Utilities, Creating and Establishing a Public Service Commission, Prescribing the Powers and Duties of the Commission and the Rights and Duties of Public Utilities, Providing Penalties for Violations of Provisions of the Act, Repealing Laws in Conflict with the Provisions thereof and Appropriating Money to Carry out the Purposes of the Act.
It is enacted as follows:

1.¹ This act shall be known as the public service commission law. Short Title.

ARTICLE I.

DEFINITIONS.

11. Unless otherwise specified, the word "commission" when Commission.
used in this act shall mean the Public Service Commission of
....., which is created and established by this act.

12. The term "municipality" shall mean and include any town, Municipality.
village, city or other body politic.

13. The term "municipal council," when used in this act, shall Municipal
mean and include the city council, common Council, the board of
aldermen, the board of selectmen, the board of trustees, the town or
village board, the city commission, or any other governing body of
any town, village, city or other body politic.

14. The term "person," when used in this act, shall mean and Person.
include individuals, associations of individuals, firms, partnerships,
corporations, their lessees, trustees or receivers appointed by any
court whatsoever, in the singular number as well as in the plural.

¹ Numbers 2 to 10, inclusive, are not assigned to sections.

Public Utility.

15. The term "public utility," when used in this act, shall be taken to mean and include every company and person, their lessees, trustees, or receivers appointed by any court whatsoever, that owns, operates, leases or controls, or is about or has power to own, operate, lease or control:

- (a) Any plant, property or facility for the transportation or conveyance of passengers or property, directly or indirectly for the public, between points within this state, by railroad, street railroad or water.
- (b) Any plant, property or facility for the conveyance or transmission of telephone or telegraph messages or for the furnishing of facilities for the transmission of intelligence by electricity, directly or indirectly for the public.
- (c) Any plant, property or facility to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power, including any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power; provided, however that the provisions of this act shall not apply to the generation, transmission and distribution of electricity by a producer, who is not otherwise a public utility, for the sole use of such producer or for the use of tenants of the producer and not for sale to others.
- (d) Any plant, property or facility to facilitate the manufacture, distribution, sale or furnishing of natural or manufactured gas for light, heat or power; provided, however, that the provisions of this act shall not apply to the manufacture and distribution of gas which is made or produced and distributed by a producer, who is not otherwise a public utility, for the sole use of such producer or the use of tenants of such producer and not for sale to others.
- (e) Any plant, property or facility for the production, transmission, conveyance, delivery or furnishing of water or of oil, steam or other substance for heat, light or power, directly or indirectly for public use; provided, however, that the provisions of this act shall not apply to the production, transmission, conveyance, delivery or furnishing of water, oil, steam or other substance by a producer, who is not otherwise a public utility, for the sole use of such producer or for the use of tenants of the producer and not for sale to others.

Rate.

16.¹ The term "rate" as used in this act shall mean and include every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility or any two or more such individual or joint rates, fares, tolls, charges, rentals or other compensations of any public utility or any schedule or tariff thereof.

¹ Numbers 17 to 30, inclusive, are not assigned to sections.

ARTICLE II.

ORGANIZATION OF A PUBLIC SERVICE COMMISSION.

31. There shall be created and established a commission which shall be known as the Public Service Commission of _____, consisting of five ¹ members appointed by the governor, by and with the consent of the senate (or council), for terms of five ¹ years each or until their successors are appointed and qualify. Immediately following the enactment of this law the governor shall appoint five commissioners, one of whom shall hold office until the first Monday in February, 1915, two, until the first Monday in February, 1917, and two, until the first Monday in February, 1919, or until their successors are appointed and qualify.²

Name and Constitution.

32. Each commissioner shall receive a salary of _____ a year,¹ payable in the same manner as the salaries of other state officers.

Salary of Commissioners.

33. As soon as possible after the first appointment of commissioners under this act the persons so appointed shall meet at the state capitol and organize by choosing one of their members as chairman and by designating a secretary who shall not be of their number. Thereafter whenever a new appointment is made or whenever any vacancy in the commission is filled the commissioners shall meet and choose one of their number as chairman.

Chairman designated by Members.

34. A majority of the commission shall constitute a quorum to transact business, but no vacancy or vacancies shall impair the right of the remaining commissioner or commissioners to exercise all the powers of the commission.

Quorum of Commission.

35. Each commissioner shall take and subscribe to the oath of office prescribed for state officers by the constitution.

Oath.

36. The governor at any time may remove any commissioner from office for inefficiency, neglect of duty, misconduct or malfeasance in office, for accepting, directly or indirectly, any gift, gratuity, emolument or employment from any public utility, for voluntarily becoming interested pecuniarily in any public utility or for failing to divest himself within a reasonable time of any interest in any public utility, or for holding another office under the constitution or laws of this state or of the United States. Before any commissioner may be removed he shall be given a copy of charges made against him and a time shall be fixed when he may be heard publicly in his own defence, which time shall be not less than ten days thereafter. If the commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges against such commissioner and of the findings thereon, with a record of the proceedings.

Removal of Commissioner.

¹ In some states a commission of three members with terms of six years each will suffice.

² In states whose legislatures meet annually this provision should be modified in such a way that a term will expire and an appointment will be made each year.

¹ The salaries of the commissioners should be not less than the salaries paid the judges of the highest state court.

Vacation of
Office.

37. No commissioner shall voluntarily become interested in any public utility; if he shall become so interested otherwise than voluntarily he shall within a reasonable time divest himself of such interest and if he fails to do so, his office shall become vacant.

Manner of Filling
Vacancies.

38. Every vacancy in the commission shall be filled for the unexpired term by appointment by the governor with the consent of the senate (or council), provided, that if any vacancy occurs while the legislature is not in session the governor may make an interim appointment until 20 days after the legislature shall next convene.

How to Sue and
Be Sued.

39. The commission may sue and be sued by its official name.

Seal.

40. The commission shall have an official seal bearing the words 'Public Service Commission of _____,' of which the courts shall take judicial notice.

Disqualification
for Membership.

41. No person employed by, or connected with, or holding any official relation to, or owning stocks or bonds of, or having any direct or indirect or pecuniary interest in, any public utility in this state shall be eligible to enter upon the duties or to fill the office of commissioner.

Conduct of
Members.

42. No commissioner or person appointed and regularly employed by and receiving a salary from the commission shall accept any gift, gratuity, emolument or employment from any public utility or any officer, agent or employee thereof, nor shall any commissioner or person, appointed or regularly employed by and receiving a salary from the commission solicit, request from, or recommend, directly or indirectly to, any public utility or any officer or agent or employee thereof the appointment of any person to any place or position. No commissioner shall hold any other public office.

Office of Com-
mission.

43. The principal office of the commission shall be in the city of _____.

Equipment of
Commission.

44. The commission shall be provided by the state with such offices, equipment and facilities as may be necessary for the performance of its duties.

Provision of
Funds.

45. There shall be appropriated out of the general funds for the maintenance and conduct of the commission such sums as may be necessary reasonably to enable the commission to perform its duties.

Secretary of
Commission.

46. The secretary of the commission shall serve during the pleasure of the commission, shall take the usual oath of office, shall keep a record of all the proceedings, transactions, communications, minutes and official acts of the commission and perform such other duties as the commission may prescribe, and shall receive a salary in an amount fixed by the commission.

Attorney of
Commission.

47. The commission is authorized to appoint and employ an attorney at a salary not exceeding _____ per annum¹ who shall be a resident of this state and whose duty it shall be to represent the

¹ The salary of the attorney should be the same as that of the attorney general of the state.

commission in all proceeding in any court or before any department of the federal government to which the commission may be a party and to advise the commission in any matter or matters and otherwise and in all respects to comply with the directions of the commission.

48. ¹ The commission is authorized to appoint and employ such attorneys, clerks, stenographers, rate experts, agents, statisticians, examiners, engineers, accountants, auditors, inspectors and other employees as may be necessary to enable it to perform the duties imposed upon it by this act and to designate the duties and compensation of such appointees and employees.

Employees and
Appointees.

ARTICLE III.

GENERAL POWERS OF COMMISSION.

71. The commission shall have general supervision of all public utilities, shall inquire into the management of the business thereof and shall keep itself informed as to the manner in which such business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates, services, facilities and accounts, with respect to their compliance with the provisions of this act and with the orders of the commission.

Supervision and
Regulation of
Utilities.

72. Whenever any public utility has a controversy with any other public utility or person and all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators, the commission may act as such arbitrators, and after due notice to all parties interested shall proceed to hear such controversy, and their award shall be final. Parties may appear in person or by attorney before such arbitrators.

Arbitration.

73. The commission may confer in person, by attending conventions or otherwise, with the members of railroad or other public utility commissions of other states and with the interstate commerce commission on any matters relating to public utilities.

Authority to
confer with
Other Com-
missions.

74. The commission, or any commissioner, or any person or persons employed by the commission for that purpose, shall, upon demand, have the right to inspect or examine the books, papers, accounts, documents, plant, property and facilities of any public utility and to examine under oath any officer, agent or employee of such public utility in relation to its business and affairs; provided, that any person other than one of the commissioners who shall make such demand shall produce his authority to make inspections or examinations under the hand of a commissioner or of the secretary and under the seal of the commission.

Right to Inspect
Books and Ex-
amine Agents of
Public Utilities.

75. The commission by order may require any public utility to produce within the state at such time and place as it may designate any accounts, records, memoranda, books or papers kept in any office

Commission May
Require Produc-
tion of Books.

¹ Numbers 49 to 70, inclusive, are not assigned to sections.

or place without or within the state or verified copies thereof in order that an examination thereof may be made by the commission or under its direction.

Summary Investigation.

76. Whenever the commission shall believe that an investigation of any act or omission to act, accomplished or proposed, or an investigation of any rate, classification, service or facility or of any rule, regulation, practice or act in any way relating thereto of any public utility or public utilities rendering joint service, should be made in order to secure compliance with the provisions of this Act it may of its own motion summarily investigate the same with or without notice.

Complaints.

77. (a) Any public utility or any 25 persons, or any mercantile, manufacturing or agricultural society, or any municipality, or the attorney general may complain to the commission of any thing, actual or proposed, done or omitted to be done by any public utility in violation of any provision of this act, and it shall be the duty of the commission to entertain such complaint and to proceed therewith as provided for elsewhere in this act.

(b) Upon any such complaint alleging that any rate, classification or rule or regulation relating thereto, of any public utility or any public utilities rendering joint service, is unjust, unreasonable, unjustly discriminatory, or unduly preferential, the commission may proceed to investigate the matters complained of as provided for elsewhere in this act.

(c) Upon any such complaint alleging that any service or facilities or any rule, regulation, practice or act in any way relating thereto is or are unreasonable, unjustly discriminatory, unduly preferential, inadequate or unsafe, the commission may proceed to investigate the matters complained of as provided for elsewhere in this act.

Scope of Investigations.

78. In conducting any investigation pursuant to the provisions of this act, the commission may investigate, consider and determine such matters as the cost or value of the property and business of any public utility, used and useful for the convenience of the public, and all matters affecting or influencing such cost or value; the operating statistics of any public utility, both as to revenues and expenses and as to the physical features of operation, in such detail as the commission may deem advisable; the physical characteristics and geographical limits of the locality or area affected by the service of a public utility; and such other matters as in the opinion of the commission may have a bearing upon the subjects under investigation. Every public utility shall, at the request of the commission, furnish all available information in aid of such investigation.

Commission may make orders.

79. Whenever after hearing and investigation in accordance with the provisions of this act, the commission shall be of the opinion that any public utility is violating, has violated, or is about to violate any provision or requirement of this act, it may make and enter of record an order in the premises, specifying the actual or proposed acts or omission to act which constitute such real or proposed violation, and it may in its order prescribe the conduct of the public utility which will rectify such actual or prevent such proposed violation of the provisions of this act.

80. If upon investigation any rate, classification, or rule or regulation relating thereto, of any public utility, or of any public utilities rendering joint service, shall be found by the commission to be unjust, unreasonable, unjustly discriminatory or unduly preferential or otherwise in violation of any provision of this act, the commission may fix and order substituted therefor such rate, classification, or rule or regulation relating thereto, as it shall determine to be just and reasonable. Such rate, classification, or rule or regulation relating thereto, so ascertained, determined and fixed by the commission, shall be charged, enforced, collected and observed by the public utility or public utilities in the future; provided, that in the case of a public utility that is a railroad the commission shall prescribe a period of time of not more than two years during which such rate, classification, or rule or regulation relating thereto, shall be enforced and complied with.

Determination of reasonable rates.

81. If upon investigation any service or facilities or any rule, regulation, practice or act in any way relating thereto of any public utility, or of any public utilities rendering joint service, shall be found by the commission to be unreasonable, inadequate, unsafe, unjustly discriminatory or unduly preferential or otherwise in violation of any provision of this act, the commission may prescribe and order substituted therefor such service, facilities, or rule, regulation, practice or act relating thereto, as it shall determine to be just and reasonable. It shall be the duty of the public utility or public utilities to comply with and conform to such determination and order of the commission.

Commission may prescribe service or facilities.

82. Whenever any order of the commission involves expenditures of any sum or sums by public utilities rendering any joint service or services and the public utilities affected thereby shall fail to agree upon the division or apportionment thereof within a reasonable time after the service of such order, the commission may issue a supplemental order declaring the apportionment or division of such expense and such supplemental order shall take effect of its own force as part of the original order.

Division of expense incurred by utilities rendering joint service.

83. All reports, records, and accounts in the possession of the commission shall be open to inspection by the public at all times, except as ordered by the commission and under rules prescribed by the commission.

Publicity of commission records.

84. The commission is authorized to fix and establish a schedule of fees to be charged for copies of opinions, orders, reports and other records of the commission and certifications under the seal of the commission. All fees received by the commission shall be turned over to the state treasurer at monthly intervals.

Fees.

85. Annually on or before the first day of February the commission shall report to the governor for transmittal to the legislature its proceedings for the preceding year. Such report shall set forth in such detail as the commission may deem expedient all proceedings and investigations of the commission during such period and shall contain abstracts of the annual reports of public utilities prepared by the commission. It shall also contain recommendations of the commission for new legislation and any other matters the

Annual report to Governor.

commission desires to call to the attention of the governor and legislature. A sufficient number of copies of this report to accommodate all reasonable requests therefor shall be printed.

Incidental powers.

86.¹ In addition to the powers herein specifically granted, the commission shall have such implied or incidental powers as may be necessary and proper effectually to carry out, perform and execute all the powers so granted.

ARTICLE IV.

REGULATION OF STOCK AND BOND ISSUES.

Right to issue stock and create lien a special privilege.

101. The power of public utilities to issue stocks, stock certificates, bonds, notes and other evidences of indebtedness, in case of public utilities incorporated under the laws of this state, and to create liens on property in this state in case of public utilities incorporated under the laws of any state, is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the commission may prescribe.

State does not guarantee stocks, bonds, etc.

102. No provision of this act and no deed or act done or performed under or in connection therewith shall be held or construed to obligate the state of ——— to pay or guarantee in any manner whatsoever any stock, stock certificate, bond, note or other evidence of indebtedness authorized, issued or executed under the provisions of this or any other act, or to pay or guarantee in any manner whatsoever any interest or dividends thereon.

Purpose for which stocks, bonds, etc., may be issued.

103. Subject to the provisions of this act and of the order of the commission issued as provided in this act, a public utility may issue stocks, stock certificates, bonds, notes and other evidences of indebtedness payable at periods of more than 12 months from the date thereof, when necessary and reasonably required for the following purposes and no others, viz.,

(a) Acquisition of property.

(b) Construction, extension, betterment, or improvement of or addition to its facilities.

(c) Discharge or lawful refunding of its obligations.

(d) Reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility not directly or indirectly, secured by or obtained from the issue of stocks, stock certificates, bonds, notes or other evidences of indebtedness of such public utility, within five years next prior to the filing of an application with the commission for the required authorization, for any of the aforesaid purposes, not including maintenance of service, replacements and substitutions (if the applicant shall have kept its accounts and vouchers for such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditures were made and the sources of the funds in the treasury of the public utility applied to such expenditures.)

¹ Numbers 87 to 100, inclusive, are not assigned to sections.

Provided, and not otherwise, that such public utility in addition to the other requirements of law, shall first have secured from the commission an order authorizing such issue as provided in this act.

104. No public utility shall issue any stocks, stock certificates, bonds, notes or other evidences of indebtedness to an amount exceeding that which may be necessary and reasonably required to enable such public utility to perform its duty to the public and for the purpose for which such issue of stocks, stock certificates, bonds, notes or other evidences of indebtedness may be authorized. Issues not to Exceed amounts reasonably required.

105. No public utility shall issue any stock or stock certificate except in consideration of money or of services or property at the true money value thereof as found and determined by the commission, actually received by such public utility equal to or in excess of the face value of such stock or stock certificate. Stock issued at par only.

106. No public utility shall issue any bonds, notes or other evidences of indebtedness, except in consideration of money, or of services or property at the true money value thereof as found and determined by the commission actually received by such public utility equal to or in excess of the true money value of the bonds, notes or other evidences of indebtedness issued therefor; and in no case shall the money or the true money value of the services or property as found and determined by the commission be less than 75 per cent of the face value of the bonds, notes or other evidences of indebtedness; provided, however, that no bonds, notes or other evidences of indebtedness of any such public utility issued for the purpose of paying, refunding, retiring or discharging any of its bonds, notes or other evidences of indebtedness, shall be issued to pay, refund, retire or discharge any discount or expenses paid or incurred by such public utility upon or in connection with the issuance of the bonds, notes or other evidences of indebtedness to be paid, refunded, retired or discharged. Bonds may be issued below par.

107. The amount of bonds, notes and other evidences of indebtedness which any public utility may issue shall bear a reasonable proportion to the amount of stock and stock certificates issued by such public utility, due consideration being given to the nature of the business in which the public utility is engaged, its credits, earnings and prospects, and to the effect which such issue will have upon the management and efficiency of operation of the public utility, so as to secure an adequate relative amount of financial interest and risk on the part of the stockholders in the utility. Relative proportions of stocks and bonds.

108. The order of the commission authorizing the issue of any stocks, stock certificates, bonds, notes or other evidences of indebtedness, payable at periods of more than 12 months from the date thereof, shall state:— What order shall show.

(a) The amount and character of the authorized issue.

(b) The purpose or purposes to which the issue or the proceeds thereof are to be applied.

(c) That, in the opinion of the commission, the money, property or services to be procured or paid for by such issue is

necessary and reasonably required to enable the public utility to perform its duty to the public and for the purpose or purposes specified in the order.

(d) That, in the opinion of the commission, the proposed expenditures for such purpose or purposes are not in whole or in part reasonably chargeable to income, except as otherwise permitted by the order.

(e) That the value of the property, services or consideration (which shall be described in detail) as found and determined by the commission, for which, in whole or in part, such issue is to be made, is equal to or in excess of the par value of the stocks or stock certificates, or the value of the bonds, notes and other evidences of indebtedness to be issued therefor.

(f) That, in the case of bonds, notes and other evidences of indebtedness, the amount of all bonds, notes and other evidences of indebtedness, including those just authorized, bears a reasonable proportion to the total amount of stocks and stock certificates outstanding.

(g) The terms and conditions upon which the issue is authorized.

Authority of commission.

109. The commission may by order authorize the issue of stocks, stock certificates, bonds, notes or other evidences of indebtedness, in the amount applied for or in a lesser amount, or in a greater amount, or not at all, and may attach to the exercise of this authority such terms and conditions as it may deem just, reasonable or proper.

Character of investigation by commission.

110. For the purpose of enabling it to determine whether the proposed issue complies with all provisions of law and whether it should be authorized, the commission may determine the true money value in detail of the property, services or other consideration, for which it is proposed to issue, in whole or in part, such stocks, stock certificates, bonds, notes or other evidences of indebtedness, and shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. The commission may also make a valuation of all the property of the public utility if it deems it pertinent to the inquiry or investigation, and may require such utility to furnish such statements, information and facts as the commission may deem pertinent.

Limitation of application of article.

111. The provisions of this act requiring public utilities to secure the approval of the commission before issuing any stocks, stock certificates, bonds, notes or other evidences of indebtedness, shall not apply to stocks, stock certificates, bonds, notes or other evidences of indebtedness lawfully issued before this act becomes a law nor to any mortgage, deed of trust or other similar instrument lawfully executed and delivered before this act becomes a law.

Utilities authorized to issue notes for a year.

112. A public utility may issue notes for proper purposes and not in violation of any provision of this or of any other act, payable at periods of not more than one year from the date thereof, without the approval of the commission, but no such notes shall, in whole or in part, directly or indirectly, be paid, retired, discharged or refunded

by any issue of stocks, stock certificates, bonds, notes or other evidences of indebtedness of any term or character, or from the proceeds thereof, without the approval of the commission.

113. All stocks, stock certificates, bonds, notes and other evidences of indebtedness of any public utility, issued without an order of the commission authorizing the same then in effect, or issued with the authorization of the commission but not conforming to the provisions of the order, or issued contrary to the provisions of this act, shall be void. The provisions of this act shall apply to all stocks, stock certificates, bonds, notes and other evidences of indebtedness of any public utility issued or delivered by any utility after this act becomes a law upon the authority of any articles of incorporation or amendments thereto, or vote of the stockholders or directors filed, taken or had before this act becomes a law. The burden of proof shall be upon any party claiming any exemption under this act. Unauthorized issues void.

114. No public utility shall without the consent of the commission apply the issue, or any part thereof, of any stock, stock certificate, bond, note or other evidence of indebtedness, or any proceeds thereof, to any purpose not specified in the commission's order, or to any purpose so specified in excess of the amount authorized for such purpose, or issue or dispose of the same on terms or conditions different from those specified in such order, or a modification thereof. Every term, condition, provision and requirement contained in such order shall be enforced, fulfilled and obeyed by the public utility affected. Application of proceeds of issues.

115. The commission may require any public utility to account for the disposition of the proceeds of all issues of stocks, stock certificates, bonds, notes and other evidences of indebtedness, in such form and detail as it may deem advisable, and to do and perform any and all acts necessary to carry out the provisions of this act. Duty of utilities to account to commission for disposition of proceeds.

116. No contract for consolidation, merger or lease shall be capitalized, nor shall any public utility hereafter issue any bonds, notes or other evidences of indebtedness against any contract for consolidation, merger or lease; but this shall not prevent the mortgaging with the approval of the commission of any contract for consolidation, merger or lease. Contract for consolidation or lease shall not be capitalized.

117. No public utility shall capitalize, directly or indirectly, any franchise to be a corporation, or any other franchise, right or privilege, or any right to own, operate or enjoy any such franchise, right or privilege whatsoever, in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to a political subdivision thereof as a consideration for the grant of such franchise, right or privilege; and in determining the value of the property of a public utility for the purposes of this act, no franchise, right or privilege granted to a public utility by the state or by a political subdivision thereof shall be appraised, fixed or considered at any greater amount or value than the sum paid therefor into the public treasury of the state or of the political subdivision granting the same (exclusive of any tax or annual charge). Franchises not to be capitalized.

Capital stock of consolidated corporation.

118. The capital stock, stock certificates and debt of a public utility resulting from merger or formed by consolidation of two or more public utilities shall not exceed at the time thereof the sum of the capital stock, certificates of stock and debt of the public utilities so consolidated, at the par value thereof.

Reorganizations.

119. Any public utility which shall have, or may hereafter become the owner or assignee of any right, power, privilege or franchise of any public utility, in whole or in part, directly or through an intermediate grantor or grantors, under a mortgage sale, sale in bankruptcy proceedings or sale under any judgment, order, decree or proceedings of any court, including the courts of the United States, shall be subject to the same power of supervision, regulation, restriction and control that applies to other public utilities under the provisions of this act.

Impairment of capital.

120.¹ If the commission determines that the capital of a public utility has been or is being impaired or that stocks, stock certificates, bonds, notes or other evidences of indebtedness have been issued in whole or in part for purposes which should have been charged to income, the commission may by order require such public utility to set aside within a reasonable time a sum of money annually or monthly out of income or from any other moneys in the treasury of the public utility not directly or indirectly, secured or obtained from the issue of stocks, stock certificates, bonds, notes or other evidences of indebtedness of such public utility and may prescribe the period for which such amount shall be set aside, the use to be made of such funds and such other conditions and requirements as it may determine are just, reasonable or proper.

ARTICLE V.

INTERCORPORATE RELATIONS.

Manner of Assignment, lease, mortgage, etc., of property.

131. No public utility shall, after this act becomes a law, assign, transfer, lease, mortgage, sell, or otherwise dispose of or encumber, directly or indirectly, by any means whatsoever, the whole or any part of its franchises, plant, equipment or other property necessary or useful in the performance of its duties to the public without first having secured from the commission an order approving such assignment, transfer, lease, mortgage, sale, disposal or encumbrance.

Nothing in this section shall be construed to prevent the sale, lease, assignment or transfer by any public utility of any plant, equipment or other property (exclusive of any franchise, permit, right or privilege to own or operate a plant of a public utility), which is not necessary or useful in the performance of its duties to the public, and any property sold, leased, assigned or transferred by a public utility without the approval of the commission, shall be conclusively presumed to be property which is not useful or necessary in the performance of its duties to the public as to any purchaser of such property in good faith for value.

¹ Nos. 121 to 130 inclusive are not assigned to sections.

132. No public utility shall, by any means whatsoever, direct or indirect, merge or consolidate its franchises, plant, equipment or other property with that of any other public utility without first having secured from the commission an order approving such merger or consolidation. Manner of merger or consolidation.

133. Every assignment, transfer, lease, mortgage, sale, or other disposition or encumbrance of the whole or any part of the franchises, plant, equipment or other property necessary or useful in the performance of its duty to the public of any public utility, or any merger or consolidation thereof, made otherwise than in accordance with the provisions of this act and of the order of the commission authorizing the same, shall be void. Unauthorized transfers or mergers void.

134. The authorization of the commission to assign, transfer, lease, mortgage or otherwise dispose of or encumber a franchise, permit, right or privilege under section 131 of this article, or to merge or consolidate under section 132 of this article, shall not be construed to revive or validate any expired, forfeited or invalid franchise, permit, right or privilege, or to enlarge or add to the powers and privileges contained in the grant of any franchise, permit, right or privilege, or to waive any forfeiture. Authority not to validate lapsed franchises.

135. No public utility shall make any contract, agreement or arrangement, written or oral, with any other public utility for the operation of its plant, equipment or other property, or any part thereof, without first having secured from the commission an order approving the same. Manner of contracting for operation of works.

136.¹ Whenever application is made to the commission for its approval of— When approval is to be given.

- (a) The assignment, transfer, lease, mortgage, sale, disposal or encumbrance of any property of a public utility;
- (b) Any merger or consolidation;
- (c) Any contract, agreement or arrangement for the operation of the plant, equipment or other property of a public utility—

The commission shall withhold its approval if it finds that the exercise of such privilege is not reasonably necessary, or is inconsistent with the public interest or detrimental thereto. The commission shall make such order in the premises as it may deem proper and may attach such terms and conditions to the exercise of the privilege authorized as it may deem reasonable, necessary and proper.

ARTICLE VI.

RATES.

(a) *Requisites of lawful Rates.*

151. All rates, classifications, and rules and regulations relating thereto, for any service rendered or to be rendered by any public utility, or jointly by any public utilities, shall be just and reasonable. Reasonable rates, rules and regulations.

¹ Numbers 137 to 150, inclusive, are not assigned to sections.

able, and all unjust and unreasonable rates, classifications, and rules and regulations relating thereto, for such service, are prohibited and declared unlawful.

Discrimination prohibited.

152. Except as provided in section 157, no public utility or public utilities shall directly or indirectly, by any device whatsoever, or in any wise, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility, or by such public utilities jointly, than is charged, demanded, collected or received by such public utility or public utilities from any other person for a like and contemporaneous service under substantially similar circumstances and conditions.

Departure from published schedules.

153. Except as provided in section 157, no public utility or public utilities shall directly or indirectly, by any device whatsoever, or in any wise, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility, or by such public utilities jointly, than that prescribed in the schedules of such public utility or public utilities then filed and published in the manner provided in this act, nor shall any person receive or accept any service from a public utility for a compensation greater, less or in any way different from that prescribed in such schedules.

Furnishing part of facilities.

154. No public utility or public utilities shall demand, charge, collect or receive from any person less compensation for any service rendered or to be rendered by such public utility, or by such public utilities jointly, in consideration of the furnishing by said person of any part of the facilities incident to such service; provided, nothing herein shall be construed as prohibiting any public utility, or any public utilities rendering joint service, from renting any facilities incident to service, and paying a reasonable rental therefor.

Undue preference or advantage prohibited.

155. Except as provided in section 157, no public utility, and no public utilities rendering joint service, shall, as to rates, classifications, or rules or regulations relating thereto, make or grant any undue or unreasonable preference or advantage to any person, locality or particular description of service, or subject any person, locality or particular description of service to any undue or unreasonable prejudice or disadvantage.

Schedules filed before performing service.

156. No public utility unless otherwise authorized by the commission shall render any service to the public unless or until the rate, classification, and all rules and regulations relating thereto, applicable to such service have been filed with the commission and published in accordance with the provisions of this act.

Service at reduced rates.

157. Nothing in this act shall prohibit any railroad from furnishing free or reduced rate transportation of the person or of property over its line, to officers, attorneys, surgeons, directors or employes of such railroad, or dependent members of their families, or to former employes of such railroad or dependent members of their families where such employes are pensioned, or have become disabled in the service of such carrier or are unable from physical disqualification to

continue in such service; nor prohibit the exchange of transportation of the person or of property by such railroad with officers, attorneys, surgeons, directors or employes of other railroads; nor prohibit any telephone or telegraph company from furnishing service free or at reduced rates to officers, attorneys, surgeons, directors or employees of such telephone or telegraph companies or of other telephone or telegraph companies when service is required by such officers, attorneys, surgeons, directors or employees in the performance of their duties; nor prohibit telephone, telegraph and express companies from entering into contracts with railroads for the exchange of services; provided, that no service of any kind shall be furnished free or at reduced rates by any public utility, or jointly by any public utilities, to any candidate for or incumbent of any office or position under the constitution or laws of this state or under the ordinances of any municipality thereof.

(b) Establishment and Change of Rates.

158. Every public utility shall establish, observe and enforce just and reasonable rates, classifications and rules and regulations relating thereto. Establishment of rates by utility.

159. It shall be the duty of the commission to regulate the rates, classifications, and rules and regulations relating thereto, of every public utility, and of all public utilities rendering joint service. Authority of commission.

160. To enable it to make such an investigation as in its opinion the public interest requires, the commission, at its discretion, for a period not exceeding three months, may suspend the operation of any rate, classification, or rule or regulation relating thereto, or of any schedule of rates, classifications, or rules or regulations relating thereto, filed with the commission under the provisions of this article. Unless as a result of its investigation the commission otherwise orders before the termination of such period of three months, such rate, classification or rule or regulation relating thereto, or such schedule of rates, classifications, or rules or regulations relating thereto, shall thereupon become effective. The commission may make any order in the premises which it is authorized by any of the provisions of this act to make in an investigation on complaint or on its own motion without complaint. Commission suspend schedules.

162. After hearing on complaint, or on its own motion without complaint, the commission may establish joint services to be participated in by two or more public utilities and may ascertain, determine and fix for such services just and reasonable rates, classifications, and rules and regulations relating thereto, which shall be charged, enforced, collected and observed by such public utilities. Establishment of joint rates.

163. Whenever the public utilities involved shall fail to agree among themselves upon the apportionment or division of any joint rate or classification established by the commission or substituted by the commission for any joint rate or classification found to violate any provision of this act, the commission may issue a supplemental order declaring the apportionment or division of such joint rate or classification, and such supplemental order shall take effect of its own force as a part of the original order. Division of joint rates.

Sliding scale of charges.

164. Any public utility may enter into an arrangement for a fixed period, not to exceed five years, for the automatic adjustment of charges for or character of services performed in relation to the profits to be realized by such public utility, provided, that a schedule of such automatic adjustment of charges or services shall first have been approved by the commission.

Interstate rates.

165. The commission may investigate all existing or proposed interstate rates, classifications, and rules and regulations relating thereto, where any act under such rates, classifications, rules and regulations shall or may take place within this state. When such rates, classifications, or rules or regulations relating thereto, are in the opinion of the commission unjust, unreasonable, unjustly discriminatory or otherwise or in any respect in violation of the provisions of the act to regulate commerce or of any other act of congress or in conflict with the rules and orders of the interstate commerce commission or of any other department of the federal government, the commission may apply for relief by petition or otherwise to the interstate commerce commission or to any other department of the federal government or to any court of competent jurisdiction.

Emergency rates.

166. The commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the public or of any public utility in this state, in case of any emergency to be judged of by the commission, temporarily to alter, amend or suspend any one or more of the rates, classifications, or rules or regulations relating thereto, of any public utility or public utilities in the state; such alteration, amendment or suspension to be effective during such time as shall be prescribed by the commission.

(c) *Publicity.*

Filing of schedules.

167. Within a time to be fixed by the commission, every public utility shall file with the commission schedules showing all rates, classifications and rules and regulations relating thereto, for every service rendered or to be rendered by it.

Filing of joint schedules.

168. Where two or more public utilities are engaged in performing joint service, schedules of the rates, classifications, and rules and regulations relating thereto, for such joint service, shall be filed with the commission by one of such public utilities; and each of the public utilities party to such joint service, other than the one filing such schedules, shall file with the commission such evidence of concurrence therein, or acceptance thereof, as may be required or approved by the commission.

Posting of schedules.

169. Copies, for the use of the public, of all such schedules as are required by this act to be filed with the commission, shall be posted in each public office of every public utility issuing or participating in such schedules, in such place as to be accessible to the public and conveniently inspected, thirty days before they are to take effect, unless a shorter time is permitted by the commission; provided, that in lieu of posting its entire schedules at each office, any public utility may file and keep posted at each office schedules of such rates, classifications and rules and regulations relating

thereto, as on application the commission shall determine to be required in the public interest.

170. All changes authorized to be made in any rate, classification or rule or regulation relating thereto, of any public utility or any public utilities rendering joint service, shall be filed with the commission and posted for the use of the public in the manner herein prescribed for the filing of schedules. Changes in schedules.

171. The commission may determine and prescribe the form in which the schedules required by this act to be filed with the commission and to be kept open to public inspection, and all changes therein, shall be prepared and arranged, and may change the form from time to time if it shall be found expedient; provided, however, that the commission shall endeavour to have such form or forms prescribed by it conform as far as practicable to any similar form or forms prescribed by the interstate commerce commission. Form of schedules.

172.¹ Every public utility shall file with the commission, for such use as the commission may deem proper, copies of such contracts, agreements or arrangements with other public utilities to which it may be a party, as the commission may designate, and every public utility when and as required shall exhibit to the commission any contract, agreement or arrangement with any other person or copies thereof. Every railroad, and every telephone, telegraph and express company shall, whenever required by the commission, file with the commission statements of passes, tickets, mileage books or franks, issued by such public utility free or at rates lower than those open to the public in general, or of other authorization of service free or at reduced rates, said statements to cover such periods of time and such classes of service, and to include such information connected with the issuance thereof, as the commission may prescribe. Filing of contracts, agreements and arrangements.

ARTICLE VII.

ADEQUACY AND SAFETY OF SERVICE.

201. The service and facilities of every public utility, and every rule, regulation, practice or act in any way relating thereto, shall be reasonable, adequate and safe. Service required to be adequate and safe.

202. It shall be unlawful for any public utility to make, or to permit to exist, any unjust or unreasonable discrimination or undue preference with respect to its service or facilities or to any rule, regulation, practice or act relating to any service or facilities. Unjust discrimination in service prohibited.

203. It shall be the duty of the commission to regulate the service and facilities of every public utility and of public utilities rendering joint service, and all rules, regulations, practices and acts relating thereto, and to enforce the provisions of this act pertaining to such service and facilities and rules, regulations, practices or acts relating thereto, and the commission is authorized to do all things necessary to that end. Commission shall regulate service.

¹ Numbers 173 to 200, inclusive, are not assigned to sections.

Standards of service.

204. The commission shall prescribe adequate and reasonable standards of quality, pressure, voltage or other conditions pertaining to the rendering of service by any public utility or by any public utilities rendering joint services, and shall prescribe reasonable regulations for the examination and testing of such service and for the measurement thereof.

Inspection of service by commission.

205. The commission may provide for the inspection of the manner in which any public utility conforms to regulations prescribed by the commission for the examination and testing of its service, and for the measurement thereof, and the commission may examine and test the service of any public utility and the measurement thereof.

Meter Accuracy.

206. The commission may prescribe rules, regulations and standards to secure the substantial accuracy of all meters and appliances for measurement, and every public utility is required to comply therewith.

Inspection of meter accuracy.

207. The commission may provide for the inspection of the manner in which any public utility complies with the rules, regulations and standards fixed by the commission to secure the accuracy of all meters and appliances for measurements, and the commission may examine and test any and all meters and appliances for measurements, under such reasonable rules and regulations as it may prescribe.

Measuring appliances; testing, fees.

208. Any consumer or user may have any meter or appliance for measurement tested upon payment of fees fixed by the commission. The commission shall declare and establish reasonable fees to be paid for examining and testing such appliances on the request of consumers or users, the fee to be paid by the consumer or user at the time of his request, but to be paid by the public utility and refunded by the public utility to the consumer or user if the measuring appliance be found unreasonably defective or incorrect to the disadvantage of the consumer or user.

Public equipment for tests.

209. The commission may make such provisions as it deems desirable for the calibration and standardization of measuring instruments used by any public utility and in so doing it shall conform as closely as practicable to the standards and methods of standardization of the National Bureau of Standards.

Entry upon premises.

210. The commission, its agents, experts, inspectors and employees, shall have power to enter upon any premises occupied by any public utility for the purpose of making the examinations and tests provided for in this article, and to set up and use on such premises any apparatus and appliances and occupy reasonable space therefor.

Joint use of facilities.

211. Whenever the commission shall find that public convenience and necessity require the use by one public utility of the conduits, subways, tracks, wires, poles, pipes or other property or equipment, or any part thereof, along any street or highway, whether on, over or under such street or highway, belonging to another public utility, and that such use will not prevent the owner or other users thereof from performing their public duties nor result in serious injury to such owner or other users of such conduits, subways, tracks, wires,

poles, pipes or other property or equipment, or in any substantial detriment to the service, or danger to the public or employees, and that such public utilities have failed to agree upon such use, or the terms and conditions or compensation for the same, the commission may by order direct that such use be permitted and prescribe a reasonable compensation and reasonable terms and conditions for such joint use.

212. Whenever the commission shall determine that public convenience and necessity require a physical connection for the establishment of a continuous line of communication between any two or more public utilities for the conveyance of telephone or telegraph messages, and that such physical connection will not prevent the owners of any part of such proposed continuous line of communication from performing their public duties nor result in serious injury to such owners of any part of the proposed continuous line of communication, the commission may by order ascertain, determine and fix the reasonable terms and conditions of such physical connection, and all rules and regulations, including the charge that shall be made to the public for the use of such continuous line and the division of the charge between such two or more public utilities, and the division or apportionment of the cost of making such physical connection between such public utilities, and it shall be the duty of such public utilities thereafter to conform to such order of the commission.

Telephone and telegraph physical connection.

213. Every public utility shall report to the commission, under rules and regulations prescribed by the commission and harmonizing in so far as practicable with those of the interstate commerce commission and of any other department of this state, every accident occurring upon the property of any public utility or directly or indirectly arising from or connected with the maintenance or operation of the plant, equipment, appliances, apparatus, property or facilities of such public utility resulting in loss of life or injury to person or property, provided, that whenever any accident occasions the loss of life or limb to any person, such public utility shall straightway advise the commission of the fact by the speediest means of communication, whether telephone, telegraph or post.

Accidents reported to commission.

214.¹ The commission shall investigate the cause of all such accidents as result in loss of life or injury to person or property as, in the judgment of the commission require investigation by it, and the commission shall have power to make such order or recommendation with respect thereto as in its judgment may be just and reasonable.

Commission to investigate accidents.

ARTICLE VIII.

REGULATION OF ACCOUNTS AND REPORTS.

230. The provisions of this article and all other provisions of this act relating to the books, papers, accounts, documents and statistics of a public utility and all penalties provided in this act

Application to municipalities.

¹ Numbers 215 to 229, inclusive, are not assigned to sections.

for the violation of such provisions shall apply and are hereby made applicable to any municipality which owns, leases or controls any plant, property or equipment for any of the purposes described and specified in paragraphs (a) to (e), inclusive, of section 15 of this act, and the term 'public utility,' when used in the provisions of this article and in other such provisions of this act, shall mean and include every such municipality. It shall be the duty of every such municipality, after this act takes effect, to comply with such provisions of this act and with any order of the commission made in pursuance thereof.

Commission to prescribe uniform accounts.

231. The commission shall prescribe, establish and order a system of accounts for each public utility, which system shall be uniform for all public utilities of the same kind, and may make regulations regarding the accounts and the statistics of each public utility for the purpose of insuring uniform and correct books of account and record, such as in the judgment of the commission may be necessary to carry out any of the provisions of this act.

Commission may classify utilities.

232. The commission may classify public utilities of the same kind in respect to the system of accounts and regulations regarding accounts and statistics, and in such classification shall consider the ability of public utilities to comply with its requirements as well as the public interests involved.

Commission may alter requirements.

233. The commission may from time to time alter, amend or repeal any system of accounts and any regulations regarding accounts and statistics. Notice of alterations or amendments shall be given to the public utilities affected thereby at least six months before they are to take effect.

Accounts kept in state.

234. Every public utility furnishing service within the state shall maintain an office located in the state, in which shall be kept such books of account and such records as the commission shall prescribe.

Depreciation account required.

235. Every public utility shall carry a proper and adequate depreciation account.

Forms of account for depreciation.

236. The commission shall prescribe rules, regulations and forms of accounts regarding such depreciation account which public utilities shall carry into effect.

Commission may fix depreciation rates.

237. The commission may in its discretion from time to time ascertain and determine and by order fix the proper and adequate rates of depreciation on the several classes of property of each public utility.

Use of depreciation reserve.

238. The moneys set aside by a public utility for depreciation shall be expended, until required for renewals or replacements, only for purposes chargeable to capital according to the system of accounts prescribed by the commission, for the retirement of its obligations and for such other purposes and under such rules and regulations as the commission may from time to time prescribe.

239. The commission, in its discretion, whenever the circumstances require, may direct that any public utility shall make provision from income from other than capital sources, under the system of accounts prescribed, for impairment of capital due to depreciation and other causes, which impairment was not provided for through charges against revenue or otherwise at the time of its occurrence or subsequently, and it shall be the duty of such public utility to comply with such direction.

Provision for impairment of capital.

240. (a) Every public utility shall keep its books, papers and records and render its accounts accurately and faithfully according to the system and in the manner and form prescribed by the commission, and shall comply with all directions of the commission relating thereto. It shall be unlawful for any public utility to keep any general ledger or balance sheet accounts other than those prescribed or approved by the commission or by the interstate commerce commission.

Utilities to conform to system.

(b) Every public utility when required by the commission shall file with the commission a certification by a public accountant as to the compliance by the public utility with the system of accounts and regulations regarding accounts and statistics prescribed by the commission. The commission, in its discretion, may require that the accountant employed by a public utility for such certification shall not be a shareholder, officer or other permanent or regular employee of such public utility.

241. The commission may provide for the examination and audit of all accounts of public utilities. If it shall determine that any expenditures or receipts have been improperly charged or credited it may order the necessary changes in the accounts.

Commission may audit accounts.

242. Every public utility, when and as required by the commission, shall file with the commission such annual, monthly or other regular reports, or special reports, and such other information as the commission may desire. When required by the commission, such reports and information shall be certified under oath by a duly authorized officer having knowledge of the matters contained therein, and the commission may in addition thereto at its discretion require a certification by a public accountant. The commission may at any time require from any public utility specific answers to any questions upon which it may desire information. The commission may in its discretion grant extensions of the time within which reports and information are required to be filed. Annual reports, however, shall be filed within two months after the close of the fiscal year and any extensions of such period shall not exceed in the aggregate 30 days.

Utilities required to report to commission.

243. The commission shall prepare and distribute in duplicate to every public utility blank forms for any report or reports required under this act.

Commission to prepare blank forms.

244.¹ When any report is erroneous or defective or appears to the commission to be erroneous or defective, the commission may require the public utility to amend such report within a time to be prescribed by the commission.

Defective reports.

¹ Numbers 245 to 270, inclusive, are not assigned to sections.

ARTICLE IX.

FRANCHISES.

Future franchises granted to public utilities.

271. No license, permit, or franchise to construct, own or operate any plant or facility of a public utility shall be hereafter granted or transferred to any grantee or transferee other than a corporation duly incorporated or licensed or permitted to do business under the laws of this state.

Certificate before furnishing service.

272. No public utility after this act becomes a law shall furnish any new service in this state or begin the construction of any new plant or new facility in any street or public place until it shall have obtained a certificate from the commission that public convenience and necessity require the furnishing of such new service or the construction of such new plant or new facility.

Certificate of convenience and necessity.

273. Whenever after hearing, the commission determines that any new construction or the furnishing of any new service by a public utility will promote the public convenience and necessity it shall have the power to issue a certificate to that effect.

Authority exercised within two years.

274. Unless exercised within a period designated by the commission but not exceeding two years from the grant thereof, authority conferred by a certificate of convenience and necessity issued by the commission shall be null and void.

Franchises subject to regulation by commission.

275. Every license, permit or franchise, hereafter granted to any public utility by the state or by any municipality and all future contracts, ordinances, rules, regulations and orders entered into or made by any municipality relating to the use or enjoyment of rights and franchises granted to any public utility, shall be subject to the exercise by the commission of any and all of the powers of regulation provided for in this act.

Exercise of franchises previously granted.

276. No public utility shall exercise any right or privilege in any place or territory under any franchise or permit heretofore granted but not heretofore actually exercised in such place or territory or the exercise of which therein has been suspended for more than one year without first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege.

Provisions of future grants.

277. Every license, permit or franchise hereafter granted to any public utility shall be granted subject to the provisions of this act and subject to the right of the municipality in which the major part of its property acquired, constructed or operated in pursuance of such grant is situate, to purchase the property of such public utility acquired, constructed or operated in pursuance of such grant and actually used and useful for the convenience of the public at any time as provided herein, paying therefor just compensation to be determined by the commission and according to terms and conditions of purchase and sale fixed by the commission. Any such municipality is authorized to purchase and operate such property and every such public utility is required to sell such property to

such municipality at the value and according to the terms and conditions determined by the commission as herein provided.

278. Every license, permit or franchise hereafter granted to a public utility shall continue in force until such time as the municipality shall exercise its election to purchase, as provided in this act, or until it shall be otherwise terminated according to law. Duration of future grants.

279. Any public utility operating under any license, permit or franchise granted before this act takes effect may at any time surrender such license, permit or franchise, with the consent of the municipality which granted such license, permit or franchise, or its successor, and receive in lieu thereof by the act of such surrender a license, permit or franchise subject to the provisions of this act. Surrender of existing grants.

280. Any public utility accepting or operating under any license, permit or franchise hereafter granted shall, by acceptance of any such license, permit or franchise, be deemed to have consented to a future purchase and operation of its property acquired, constructed or operated in pursuance of such license, permit or franchise and actually used and useful for the convenience of the public, by the municipality in which the major part of such property is situate, for the compensation and under the terms and conditions of purchase and sale determined by the commission, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be established by the verdict of a jury, and to have waived all other remedies and rights relative to condemnation, except such rights and remedies as are provided in this act. Future grants, acceptance, implied consent and waiver.

281. (a) Any municipality shall have the power, subject to the provisions of this act, to construct and operate a plant and equipment or any part thereof for the production, transmission, delivery or furnishing of heat, light, water or power. Municipalities, powers, acquiring and operating plants.

(b) Any municipality shall have the power, subject to the provisions of this act, to purchase by an agreement with any public utility and operate any part of any plant and equipment, provided that such purchase and the terms thereof shall be approved by the commission after a hearing as provided in sections 283 and 284.

(c) Any municipality shall have the power, subject to the provisions of this act, to acquire by condemnation and operate the property of any public utility actually used and useful for the convenience of the public then operating under a license, permit or franchise existing at the time this act takes effect, or operating in such municipality without any permit or franchise.

(d) Any municipality shall have the power, subject to the provisions of this act, to acquire by purchase as provided in this act, and operate the property of any public utility actually used and useful for the convenience of the public operating under any license, permit or franchise granted after this act takes effect.

282. Any municipality may determine to acquire the property of a public utility, as authorized under the provisions of this act, by a vote of a majority of the electors voting thereon at any general, municipal or special election at which the question of the purchase of such property shall have been submitted. In the event that such Action by municipalities to acquire plants.

property shall be operated at the time of such determination under a license, permit or franchise now existing and the public utility shall not have agreed to such purchase by the municipality, such municipality shall bring an action in the court of record of general jurisdiction of the county in which such municipality is situated against the public utility as defendant praying the court for an adjudication as to the necessity of such taking by the municipality. The public utility shall serve and file its answer to such complaint within 30 days after the service thereof, whereupon such action shall be at issue and stand ready for trial upon 30 days' notice by either party. Unless the parties thereto waive a jury, the question as to the necessity of the taking of such property by the municipality shall be submitted to a jury.

Notice to commission.

283. If any municipality shall have determined to acquire any property of a public utility, and if the public utility owning such property shall have consented to the taking over of such plant by the municipality or, if such property is operated under a license, permit or franchise granted after this act takes effect, or in cases where the necessity of such taking is required to be determined by a court or jury, if the court or jury shall have found that a necessity exists for the taking of such property, then the municipality shall give speedy notice of such determination and of such required finding, if any, of a court or jury to the public utility and to the commission.¹

Compensation to be determined by commission, notice.

284. The commission shall thereupon proceed to set a time and place for a public hearing upon the matters of the just compensation to be paid for the taking of the property of such public utility actually used and useful for the convenience of the public, and of all other terms and conditions of the purchase and sale, and shall give to the municipality and the public utility interested not less than 30 days' notice of the time and place when and where such hearing will be held and such matters considered and determined, and shall give like notice to all mortgagees, lienors, and all other persons having or claiming to have any interest in such public utility, by publication of such notice once a week for not less than three successive weeks in at least one newspaper of general circulation and published in the county in which the property of such public utility to be taken is located, which publication shall be caused to be made by the municipality. Within a reasonable time, not exceeding one year, after the time fixed for such hearing in such notice, the commission shall, by order, fix and determine and certify to the municipal council, to the public utility and to any bondholder, mortgagee, lienor or other creditor appearing upon such hearing, the just compensation to be paid for the taking of the property of such public utility actually used and useful for the convenience of the public and all other terms and conditions of sale and purchase which it shall ascertain to be reasonable. The compensation and other terms, the conditions of sale and purchase thus certified by the commission shall constitute the compensation and terms and conditions to be paid, followed, and observed in the purchase of such plant from such public utility. Upon the filing of such certificate

¹ Any constitutional provisions relating to condemnation, including the determination of fines by a jury, would have to be followed.

with the clerk of such municipality and upon compliance with the terms and conditions of sale so certified, the exclusive use of the property taken shall vest in such municipality.

285. Any public utility or the municipality or any mortgagee, Appeal. lienor or other creditor of the public utility, being dissatisfied with such order, may within 30 days commence and prosecute an action in the court of record of general jurisdiction of the county in which the purchasing municipality is located to alter or amend such order or any part thereof.

286. If the court shall not adjudge that the compensation fixed and determined in such order is unlawful or that some of the terms or conditions fixed and determined therein are in some particulars unreasonable, the compensation, terms and conditions fixed in said order shall be the compensation, terms and conditions to be paid, followed and observed in the purchase of said plant from such public utility. If decision affirmed.

287. If the court shall adjudge that such compensation is unlawful or that some of such terms or conditions are unreasonable, the court shall remand the same to the commission with such findings of fact and conclusions of law as shall set forth in detail the reasons for such judgment and the specific particulars in which such order of the commission is adjudged to be unreasonable or unlawful. If decision for utility.

288. If the compensation and terms and conditions fixed by the previous order of the commission be adjudged to be unlawful, the commission shall forthwith proceed to set a re-hearing for the re-determination of such compensation and terms and conditions as in the first instance, subject to the provisions of sections 284 to 286 hereof. Reconsideration of compensation.

289. Every municipal council shall have power:—

- (a) To determine by contract, ordinance or otherwise the quality and character of each kind of service rendered by any public utility within said municipality and all other terms and conditions not inconsistent with this act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality and such contract, ordinance or other determination of such municipality shall be *prima facie* reasonable. Upon complaint made by such public utility or any 25 consumers, or any municipality or any mercantile, manufacturing or agricultural association or the attorney general the commission shall set a hearing as provided elsewhere in this act and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. Power of councils to regulate utilities, appeal.
- (b) To require of any public utility by ordinance or otherwise such additions and extensions to its physical plant within the limits of its franchise in said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such addi-

tions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the commission as provided in subdivision (a) of this section.

- (c) The power and authority granted in this section shall exist and be vested in said municipalities anything in this act to the contrary notwithstanding.

Competition of utilities.

290.¹ No municipality shall hereafter construct any plant or equipment for a public utility service where there is in operation in such municipality a public utility engaged in similar service, without first securing from the commission a declaration, after a public hearing, that public convenience and necessity require the service of such municipal public utility. But nothing in this section shall be construed as preventing a municipality from acquiring any existing plant or equipment by purchase or by condemnation as herein provided.

ARTICLE X.

COMMISSION, PROCEDURE AND PRACTICE.

Rules of practice.

301. The commission may from time to time make, publish or amend rules for the order and regulation of all proceedings and investigations which under the provisions of this act it is authorized to conduct.

Complaint served on utility, complained of.

302. Whenever complaint has been made to the commission, as elsewhere in this act provided for, the commission may serve on the public utility or public utilities complained of a copy of such complaint, and may proceed to investigate the matters complained of.

Hearing and investigation.

303. Whenever the commission shall determine to conduct an investigation either with or without complaint as in this act provided for, it shall fix a time and place for public hearing of the matters under investigation, and shall notify the complainant, the public utility or public utilities complained of, and such other persons as it may deem proper, of such time and place of hearing, at least ten days in advance thereof. At the hearing held pursuant to such notice, the commission may take such testimony as may be offered or as it may desire, and may make such other or further investigation as in its opinion is desirable.

Service on public utilities.

304. Service on any public utility of any notice or order or other matter under the provisions of this act may be made by depositing in the mail such notice or order or other matter or a certified copy thereof, directed to the public utility at the principal office of the public utility in this state.

Separate Hearings.

305. When complaint is made of more than one matter or thing the commission may order separate hearings thereon and may hear and determine the several matters complained of separately and at such times as it may prescribe. All hearings conducted by the com-

¹Numbers 291 to 300, inclusive, are not assigned to sections.

mission shall be open to the public. In any hearing, proceeding or investigation conducted by the commission, any party may be heard in person or by attorney.

306. The commission and each of the commissioners, for the purposes mentioned in this act, may administer oaths, certify to official acts, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, documents and testimony. In case of failure on the part of any person or persons to comply with any order of the commission, or any commissioner, or any subpoena, or of the refusal of any witness to testify to any matter regarding which he may be interrogated lawfully, it shall be the duty of the court of record of general jurisdiction of any county, or the judge thereof, on application of the commission or of a commissioner, to compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein.

Power to administer oaths and subpoena witnesses, contempt.

307. Any party to a proceeding before the commission with the consent of the commission shall have process to enforce the attendance of witnesses and the production of books, papers, maps, contracts, reports and records of every description affecting the subject matter of the investigation.

Attendance of witnesses.

308. Witnesses who are summoned before the commission shall be paid the same fees and mileage that are paid to witnesses in the courts of record of general jurisdiction in this state. Witnesses whose depositions are taken pursuant to the provisions of this act and the magistrate or other officer taking the same shall be entitled severally to the same fees as are paid for like services in courts of record of original jurisdiction in this state.

Compensation of witnesses.

309. No person shall be excused from testifying or from producing books, accounts and papers in any investigation or inquiry by or hearing before the commission or any commissioner when ordered so to do, based upon or growing out of any violation of the provisions of this act, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required him, may tend to incriminate him or subject him to penalty or forfeiture; but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may have testified or produced any documentary evidence; provided, that no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying; and provided, further, that any person may expressly waive the protection of this section.

Immunity of witnesses.

310. The commission, or with the consent of the commission any party to any proceeding before the commission, may in any investigation, cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the courts of record of general jurisdiction in this state.

Depositions.

311. In the conduct of all hearings and investigations, the commission shall not be bound by the technical rules of evidence. No

Rules of evidence.

informality of any proceeding or in the manner of taking testimony before the commission or any commissioner or any agent of the commission shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission.

Dismissal of complaint absence of damage to complainant.

312. No complaint shall at any time be dismissed because of absence of direct damage to the complainant.

Record of proceedings.

313. A full and complete record of all hearings and investigations had before or by the commission, or any member or agent thereof, shall be kept by the commission, and all testimony shall be taken down by a stenographer as directed by the commission. In case of an action to review any order of the commission, a transcript of such testimony, together with all exhibits introduced and of the record and proceedings before the commission shall constitute the record of the proceedings before the commission.

Transcripts of testimony.

314. Parties to any proceeding before the commission shall be entitled to transcripts of the testimony taken in such proceedings, subject to such reasonable rules and regulations as the commission may prescribe.

Opinions and Orders published.

315. Every order of the commission shall be in writing and in cases of importance shall be accompanied by an opinion setting forth in brief the facts on which the commission has based its order. The commission shall provide for the publication from time to time and for the assembling of its opinions and orders.

Effective date of Orders.

316. Unless a different time be prescribed by the commission, every order of the commission shall be effective 30 days after the service thereof.

Service on parties.

317. Straightway after the entry of record of any order of the commission, notice thereof shall be given to every public utility affected by such order.

Modification of Orders.

318. At any time after the making and entry thereof the commission may alter, amend, annul or otherwise modify any order.

Rehearings.

319.¹At any time after an order has been made by the commission any public utility or person interested therein may apply for a rehearing in respect to any matter determined therein and the commission shall grant and hold such a rehearing if in its judgment sufficient reason therefor be made to appear, which rehearing shall be subject to such rules as the commission may prescribe. Application for such a hearing shall not excuse any public utility or person from complying with or obeying an order of the commission or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. Any order of the commission made after such rehearing shall have the same force and effect as an original order but shall not affect any right or the enforcement of any right arising from or by virtue of the original order, except as directed by the commission.

¹Numbers 320 to 330, inclusive, are not assigned to sections.

ARTICLE XI.

ENFORCEMENT OF ACT.

331. Whenever the commission shall be of the opinion that any public utility is failing or omitting, or is about to fail or omit, to do anything required of it by this act, or by any order of the commission, or is doing anything, or about to do anything or permitting anything, or about to permit anything to be done, contrary to or in violation of the provisions of this act, or of any order of the commission, it may begin and prosecute an appropriate action at law or in equity to remedy or to prevent such real or proposed violation. Commission may begin suit.

332. All provisions of the law of this state relating to venue shall apply to proceedings under this act, and in addition any action at law or in equity to enforce any provision of this act or of any order of the commission, or to prevent any proposed violation thereof, may be commenced in the court of record of general jurisdiction in such matters in and for the county in which the principal office of the commission is located or in the county where the principal office of the public utility is located. Venue.

333. All provisions of the laws of this state prescribing the duties and jurisdictions of the courts thereof shall apply to this act, and in addition it shall be the duty of the court of record of general jurisdiction in like matters in the county in which the commission has its principal office to entertain and determine all actions commenced under the provisions of section 332 of this act, and to enforce the provisions of this act, or of any order of the commission by mandamus, or by injunction or by any other appropriate remedy. Duty of courts to entertain actions.

334. When complaint has been made to the commission concerning any rate, classification or rule or regulation relating thereto, of any public utility and the commission has found after investigation that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the commission may in its discretion order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount. Commission may order reparation.

335. If a public utility does not comply with an order of the commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in any court of competent jurisdiction a petition setting forth briefly the causes for which he claims damages and the order of the commission in the premises. In such action the findings and order of the commission shall be *prima facie* evidence of the facts therein stated. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the action. Action to enforce order for reparation.

336. All complaints for the recovery of damages shall be filed with the commission within two years from the time the service as to which complaint is made was performed, and not after, and a Limitations upon actions for reparation.

petition for the enforcement of an order of the commission for the payment of money shall be filed in the proper court within one year from the date of the order and not after.

Refund of amounts collected in excess of schedule rates.

337. Whenever any public utility shall charge, collect or receive any rate or rates in excess of the rates fixed in the schedule of charges then in force, as provided in this act, it shall be the duty of such public utility straightway to refund to the person paying such excessive rates the difference between the lawful rates fixed in such schedule and the rates so charged, collected or received.

Direct appeal on questions of law.

338. After final order of the commission in any proceeding, any party claiming to be aggrieved may within 30 days apply to the court of last resort for leave to appeal from such order upon a specified point or points of law. If such appeal is allowed, it may be taken by filing in such court within ten days, a transcript of the complaint and answer and the findings and order of the commission. Such appeal shall not operate as a supersedeas unless the court shall so order, and shall be an appeal upon substantive law only and no questions of procedure, construction of complaint or answer, or admissibility of evidence or the weight thereof shall be so reviewed. Upon determination of the appeal, if it is held that the commission has erred in point of substantive law, the proceeding shall be remanded to the commission with directions to make such new or further or amended order as the opinion of the court of last resort upon the point or points of law may require.

Actions to set aside orders of commission.

339. Any public utility, and any person in interest, being dissatisfied with any order of the commission may commence an action in the court of record of general jurisdiction in such matters in and for the county in which the commission has its principal office, to vacate and set aside such order on the ground that the commission lacked authority in the premises or that if enforced the order would violate a provision, or provisions, of any law of this state, or of the constitution of this state or of the United States. The answer of the commission to the complaint shall be served and filed within 30 days after service of the complaint, whereupon said action shall be at issue and stand ready for trial upon ten days' notice to either party.

Limitation on appeals and actions to set aside.

340. Every proceeding, action or suit to set aside, vacate or annul any determination or order of the commission, or to enjoin the enforcement thereof, or to prevent in any way such order or determination from becoming effective, shall be commenced, and every appeal to the courts or right of recourse to the courts shall be taken or exercised, within 30 days after the service of a copy of such order or determination on the public utility or public utilities party thereto, and the right to commence any such action, proceeding or suit or to take or exercise any such appeal or right of recourse to the courts shall terminate absolutely at the end of such 30 days after such service.

New evidence upon trial.

341. If upon trial of such action evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the

commission or its attorney shall file a consent in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceedings in such action for such time as the court may by order fix.

342. Upon the receipt of such evidence, the commission shall consider the same and may alter, modify, amend or rescind its order complained of in said action and shall report its action thereon to said court within ten days from the receipt of such evidence. Reconsideration
by commission.

343. If the commission shall rescind its order complained of the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the commission in the first instance; if the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order. Supplemental
findings, pro-
cedure by court.

344. Either party to said action, within 30 days after service of a copy of the order or judgment of the court of original jurisdiction, may appeal to the court of last resort. Where an appeal is taken, the cause shall, on the return of the papers to such court, be immediately placed on the calendar of the then pending term and shall be assigned and brought to a hearing in the same manner as other cases on such calendar. Appeal to court
of last resort.

345. In all trials, actions and proceedings arising under the provisions of this act, or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to the commission or seeking to set aside any determination, requirement, direction or order of the commission, to show that the determination, requirement, direction or order of the commission complained of is unlawful or violates a provision of any law of this state or of the constitution of this state or of the United States, as the case may be. Burden of proof.

346. In all actions and proceedings in court arising under this act, all processes shall be served and the practice and rules of evidence shall be the same as in civil actions or in suits in equity, except as otherwise herein provided. Every sheriff or other officer empowered to execute civil process shall execute any process issued under the provisions of this act and shall receive such compensation therefor as may be prescribed by law for similar services. Court procedure
and officers.

347. No injunction shall issue suspending or staying any order of the commission, except upon application to the court of record of general jurisdiction in such matters in and for the county in which the commission has its principal office, or the presiding judge thereof, and upon notice to the commission and hearing. Injunctions
issued.

348. The order or decree of any court, enjoining the operation of any order or determination of the commission or suspending the same, shall contain a specific finding based upon evidence before the court and identified by reference thereto that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage. Injunction order
shall specify
nature of
damage.

**Rules of
procedure.**

349. The courts before which the proceedings mentioned herein may be brought as hereinbefore provided may each, respectively, from time to time make and publish or amend and modify rules and practices for the order and regulation of proceedings before them or appeals to them, including the forms of notice and service thereof.

**Expedition of
cases.**

350. Any proceeding in any court of this state, directly affecting an order of the commission, or to which the commission is a party, shall have preference over all other civil proceedings pending in such court.

**Improper refusal
to serve.**

351. Any public utility which upon the proper application, in accordance with the reasonable rules and regulations of the public utility, of any person desirous of receiving the service which the public utility is engaged in rendering or furnishing, or professing to render or furnish for public use, together with a sufficient tender of the lawful charges made therefor, shall refuse or neglect to render or furnish promptly and impartially the service so applied for is guilty of a misdemeanor and is punishable by a fine not exceeding \$5,000 for each offense.

**Inadequate
facilities.**

352. Any public utility which after reasonable notice of complaint shall neglect or refuse to furnish and provide with respect to and in connection with the service which it is rendering or furnishing for public use, for professing to render or furnish to the public, such equipment, appliances, facilities and accommodations as shall be safe and adequate and in all respects just and reasonable is guilty of a misdemeanor and is punishable by a fine not exceeding \$5,000 for each offense.

Extortion.

353. Any public utility which knowingly or wilfully shall charge, demand, receive or establish, observe and enforce any unjust or unreasonable rate, classification, or rule or regulation relating thereto, shall be guilty of a misdemeanor and shall be punishable by a fine of not exceeding \$5,000 for each offense.

**Unjust discrim-
inations.**

354. Any public utility which violates any of the provisions of sections 152 to 157, inclusive, or of section 202 of this act, shall be guilty of a misdemeanor, and shall be punishable by a fine of not more than \$5,000 for each offense, and any corporation knowingly participating in any such violation shall be deemed to be similarly guilty and punishable accordingly. In addition to any other penalty in this act provided for violation of any of the provisions of sections 152 to 157, inclusive, and of section 202, any person who knowingly authorizes, gives or affords or who knowingly receives or participates directly in the benefit of such offense, shall be guilty of a felony and on conviction shall be punishable by imprisonment as the court may direct for a period not exceeding five years.

**Failure to pub-
lish schedules.**

355. Any public utility which fails to file with the commission and print and keep open to public inspection schedules of its rates, classifications and rules and regulations relating thereto, in the manner provided in this act, shall be guilty of a misdemeanor and shall be punishable by a fine of not more than \$5,000 for each offense,

and each day's continuance of such failure shall constitute a separate offense.

356. Any public utility which, unless otherwise authorized by the commission, shall perform any service to the public unless or until the rates, classifications and rules and regulations relating thereto, applicable to such service, have been filed with the commission and published in accordance with the provisions of this act, shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding \$5,000 for each offense, and each service so rendered shall constitute a separate offense.

Performing service before publishing rate.

357. Any public utility which withholds from the commission copies of any contracts, agreements or arrangements which are required by this act to be filed with the commission, or refuses to exhibit to the commission any contract, agreement or arrangement which the commission may demand, or copies thereof, is guilty of a misdemeanor and is punishable by a fine of not more than \$5,000 for each offense, and each day's continuance of such withholding shall constitute a separate offense.

Failure to file contracts, agreements and arrangements.

358. Any public utility which fails to make and file any report called for by the commission within the time specified, or within the time extended as the case may be, or to make specific answer to any question propounded by the commission is guilty of a misdemeanor and is punishable by a fine not exceeding \$5,000 for each such offense, and each day's continuance of such failure shall constitute a separate offense.

Penalty for failure to make reports.

359. Any public utility which fails or refuses to conform to the system of accounts and regulations regarding accounts and statistics prescribed by the commission, or to submit its records, books and papers to the inspection of the commission, or its authorized agents or examiners, is guilty of a misdemeanor and is punishable by a fine of not exceeding \$5,000 for each, such failure or refusal, and each and every day of the continuance thereof shall constitute a separate offense.

Penalty for not keeping accounts.

360. Every public utility which, directly or indirectly, issues or causes to be issued, any stock, stock certificate, bond, note or other evidence of indebtedness, in non-conformity with the order of the commission authorizing the same, or contrary to the provisions of this act, or which applies the proceeds from the sale thereof, or any part thereof, to any purpose other than the purpose or purposes specified in the commission's order, as herein provided or to any purpose specified in the commission's order in excess of the amount of said order authorized for such purpose, is guilty of a misdemeanor and is punishable by a fine of not exceeding \$5,000 for each such offense.

Penalty applicable to capitalization provisions.

361. Any public utility which fails or refuses to comply with an order of the commission to produce any accounts, records, memoranda, books or papers kept outside or within the state or verified copies thereof is guilty of a misdemeanor and is punishable by a fine of not exceeding \$5,000 for each such offense, and each day of such withholding shall be held to constitute a separate offense.

Penalty for not producing books.

Penalty for
false return.

362. Any person who wilfully makes any false return or report to the commission, or to any member, agent or employee thereof, and any person who aids or abets such person, is guilty of a felony, and upon conviction shall be imprisoned as the court may direct for a term not exceeding five years.

Penalty for
falsification of
accounts.

363. Any person who wilfully makes any false entry in the accounts, records or memoranda prescribed by the commission for any public utility, or wilfully destroys, mutilates, or by any other means falsifies such accounts, records or memoranda or wilfully neglects or fails to make full, true or correct entries of all facts and transactions appertaining thereto is guilty of a felony and upon conviction shall be imprisoned as the court may direct for a term not exceeding five years.

Penalty for
destroying
records.

364. Any person who wilfully mutilates or destroys any accounts, records or memoranda of any public utility is guilty of a felony, and upon conviction shall be imprisoned as the court may direct for a term not exceeding five years; provided, however, that the commission may at its discretion issue orders specifying such operating or financial accounts, records, or memoranda of public utilities as may after a reasonable time be destroyed and the commission may prescribe the length of time such accounts, records, memoranda, books and papers shall be preserved.

Penalty for
false statement
or representation.

365. Every officer, agent or employee of a public utility, and every other person who knowingly authorizes, directs, aids in, issues or executes, or causes to be issued or executed, any stock, stock certificate, bond, note or other evidence of indebtedness, in non-conformity with the order of the commission authorizing the same, or contrary to the provisions of this act, or who, in any proceeding before the commission, knowingly makes any false statement or representation, or with the knowledge of its falsity files or causes to be filed with the commission any false statement or representation, which said statement or representation so made, filed or caused to be filed may tend in any way to influence the commission to make an order authorizing the issue of any stock or stock certificate, or any bond, note or other evidence of indebtedness, or which results in procuring from the commission the making of any such order, or who, with knowledge that any false statement or representation was made to the commission, in any proceeding, tending in any way to influence the commission to make such orders, issues or executes or negotiates, or causes to be issued, executed or negotiated any such stock or stock certificate, or bond, note or other evidence of indebtedness, or who, directly or indirectly, knowingly applies, or causes or assists to be applied the proceeds or any part thereof, from the sale of any stock or stock certificate, or bond, note or other evidence of indebtedness, to any purpose not specified in the commission's order, or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, or who, with knowledge that any stock or stock certificate, or bond, note or other evidence of indebtedness, has been issued or executed in violation of any of the provisions of this act, negotiates, or causes the same to be negotiated, is guilty of a felony, and on conviction thereof shall be imprisoned as the court may direct for a term not exceeding five years.

366. Any person who wilfully obstructs or hinders the commission or a member thereof or an authorized agent or examiner in making an inspection, examination or investigation of the accounts, records, memoranda, books or papers of any public utility or of the property or facilities thereof is guilty of a felony, and upon conviction shall be fined not more than \$5,000, or imprisoned as the court may direct for a term not exceeding five years, or both.

Penalty for obstructing commission.

367. Any regular or special employee of the commission who divulges any fact or information coming to his knowledge respecting an inspection, examination or investigation of any account, record, memorandum, book or paper or of the property and facilities of a public utility, except in so far as he may be authorized by the commission or by a court of competent jurisdiction, or a judge thereof, is guilty of a felony, and upon conviction shall be fined, as the court may direct, not more than \$5,000 or imprisoned not more than five years or both.

Penalty for divulging information.

368. Any public utility which for any reason fails or neglects within the time fixed in this act to comply with an order of the commission fixing any individual or joint rate, classification, or rule or regulation relating thereto, or fixing the division between two or more utilities of joint rates or classifications, or which refuses, neglects or otherwise fails to comply within the time fixed by this act with any order of the commission relating to its service or to the rules, regulations, practices or acts relating to its service, is guilty of a misdemeanor and is punishable by a fine not exceeding \$5,000 for each offense and each and every day of the continuance of such failure or neglect shall constitute a separate offense.

Failure to comply with order fixing rates or service.

369. Every public utility shall obey and comply with each and every requirement of every order of the commission and shall do everything proper in order to secure compliance with and observance of every such order by all of its officers, agents and employees; and if any public utility shall fail to obey and comply with any order of the commission it shall be guilty of a misdemeanor and be punishable by fine not exceeding \$5,000.

General duty of utilities to comply with orders of Commission.

370. Any officer, agent or employee of any public utility, who wilfully or knowingly does, or omits to do, any act or thing, the doing or omission of which is enjoined upon any public utility by this act, provided the doing or omission of such act renders such public utility liable to punishment under the provisions thereof, is guilty of a misdemeanor, and shall be deemed to be equally guilty with the utility and punishable in the same manner.

Agents responsible for own actions.

371. In case any public utility shall do, cause to be done, or permit to be done, any act, matter or thing prohibited, forbidden or declared to be unlawful or shall omit to do any act, matter or thing required to be done by this act, or by any order of the commission, such public utility shall be liable to the persons or corporations affected thereby for the amount of all loss, damage or injury caused thereby or resulting therefrom. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation or person.

Public utility liable for civil damages.

Assessment of
attorney's fees.

372. In every case of a recovery of damages by any person or corporation under the provisions of section 371, the plaintiff shall be entitled to a reasonable counsel's or attorney's fee to be fixed by the court, which fee shall be taxed and collected as part of the costs in the case.

Penal actions.

373. Every public utility, all officers and agents of any public utility, and every other person or corporation shall obey, observe and comply with every provision of this act and with every order made by the commission under authority of this act and duly served in accordance with its provisions, so long as the same shall be and remain in force. Any public utility or its officers or agents, and any other person or corporation, which shall violate any of the provisions of this act punishable as a misdemeanor, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall (in addition to liability to the party aggrieved for all damages sustained by reason of such violation) forfeit to the state not to exceed the sum of \$5,000 for each and every violation or in the case of a violation which is punishable as a misdemeanor not to exceed the maximum sum fixed as a fine therefor, which shall be recovered in an action at law to the use of the state by the attorney general or district attorney of the district in which such violation was committed; but no such action shall be maintained unless brought within two years after the date of such violation; nor shall such an action be maintained in the case of a person who, or corporation which, has already been convicted for the violation of this act, and recovery by an action brought in accordance with this section shall be a bar to any criminal prosecution for the same violation of this act.

Penalty for ac-
cepting rebate.

374. Any person, corporation or company receiving service from any public utility subject to the provisions of this act, who shall knowingly by an employee, agent, officer or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such public utility any sum of money or other valuable consideration as a rebate or offset against the regular charges for such service, as fixed by the schedules of rates provided for in this act, shall in addition to any penalty provided by this act forfeit to the state a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the attorney general of the state is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation or company has knowingly received or accepted from any such public utility any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the state of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other consideration so received or accepted for a period of six years prior to the commencement of the action may be included therein, and the amount recovered shall be three times the total amount of money or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Perjury.

375. Any person who knowingly makes any false statement of fact under oath, whether oral or in writing, as required by this act,

is guilty of perjury and upon conviction shall be punished as provided for in the perjury statutes of this state.

376. The remedies provided in this act by way of civil damages for persons or corporations injured by an act or omission of a public utility shall be cumulative, and in addition to any other remedy or remedies in this act provided. Remedies cumulative and not exclusive.

377.¹ All forfeitures, fines and penalties collected under the provisions of this act shall be paid into the general funds of the state. Penalties paid to general funds.

398. The following acts and parts of acts and all other acts and parts of acts in conflict with the provisions of this act are hereby repealed in so far as they are inconsistent herewith: (Here state in full the legal designations of the acts and parts of acts which are to be repealed.) Repeal of conflicting acts.

399. This act shall take effect——. When act becomes effective.

APPENDIX I.

Clauses of The Public Service Commission Law of the State of New York relating to shares and securities and Rules of Commissioners thereunder.

NEW YORK.

THE PUBLIC SERVICE COMMISSIONS LAW.

AS REVISED AND AMENDED TO CLOSE OF LEGISLATURE OF 1912.

Article I. Public service commissions; general provisions (§§1-24).

II. Provisions relating to railroads, street railroads and common carriers (§§ 25-40).

III. Provisions relating to the powers of the commissions in respect to railroads, street railroads and common carriers (§§ 45-59).

IV. Provisions relating to gas and electric corporations; regulation of price of gas and electricity (§§ 64-77).

V. Provisions relating to telegraph and telephone lines and to telephone and telegraph corporations (§§ 90-103).

VI. Commissions and offices abolished; saving clause; repeal (§§ 120-127).

52. Each commission may, whenever it deems advisable, establish a system of accounts to be used by railroad and street railroad corporations or other common carriers which are subject to its supervision, or may classify the said corporations and other carriers and Uniform system of accounts, access to accounts, et cetera, forfeitures.

¹ Numbers 377 to 397, inclusive, are not assigned to sections.

prescribe a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. It may also in its discretion prescribe the forms of accounts, records and memoranda to be kept by such corporation, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or corporations by the commission at least six months before the same are to take effect. The system of accounts established by the commission and the forms of accounts, records and memoranda prescribed by it as provided above shall conform in the case of railroad corporations as nearly as may be to those from time to time established and prescribed by the interstate commerce commission under the provisions of the act of congress entitled 'An act to regulate commerce' approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof or supplementary thereto. The commission shall at all times have access to all accounts, records and memoranda kept by railroad and street railroad corporations and by common carriers, and may designate any of its officers or employees who shall thereupon have authority under the order of the commission to inspect and examine any and all accounts, records and memoranda kept by such corporations. The commission may, after hearing, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited. Where the commission has prescribed the forms of accounts, records and memoranda to be kept by such corporations it shall be unlawful for them to keep any other accounts, records or memoranda than those so prescribed, or those prescribed by or under authority of the United States. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination except in so far as he may be directed by the commission, or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

**Franchises and
privileges.**

53. Without first having obtained the permission and approval of the proper commission no railroad corporation, street railroad corporation or common carrier shall begin the construction of a railroad or street railroad, or any extension thereof, for which prior to the time when this act becomes a law a certificate of public convenience and necessity shall not have been granted by the board of railroad commissioners or where prior to said time said corporation or common carrier shall not have become entitled by virtue of its compliance with the provisions of the railroad law to begin such construction; nor, except as above provided in this section, shall any such corporation or common carrier exercise any franchise or right under any provision of the railroad law, or of any other law, not heretofore lawfully exercised, without first having obtained the permission and approval of the proper commission. The commission within whose district such construction is to be made, or within whose district such franchise or right is to be exercised, shall have power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the franchise or privilege is necessary or convenient for the public service. And if such construction is to be made,

or such franchise to be exercised in both districts, the approval of both commissions shall be secured.

54. 1. No franchise nor any right to or under any franchise, to own or operate a railroad or street railroad shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting any such franchise or right be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the proper commission. The permission and approval of the commission, to the exercise of a franchise under section fifty-three, or to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise, or to enlarge or add to the powers and privileges contained in the grant of any franchise, or to waive any forfeiture.

Transfer of
franchises or
stocks.

2. No railroad corporation, street railroad corporation, or electrical corporation, domestic or foreign, shall hereafter purchase or acquire, take or hold, any part of the capital stock of any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of this state, unless authorized so to do by the commission empowered by this act to give such consent; and save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this chapter to give such consent, no stock corporation of any description, domestic or foreign, other than a railroad corporation, street railroad corporation, or electrical corporation, shall purchase or acquire, take, or hold, more than ten per centum of the total capital stock issued by any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any railroad corporation or street railroad corporation may with the consent of the commission acquire and hold the remainder of the capital stock of such railroad corporation or street railroad corporation or any portion thereof. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent, upon the surrender or exchange of said stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this chapter, shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such railroad corporation or street railroad corporation, or shall be recognized as effective for any purpose. The power conferred by this section to approve or disapprove a transaction relating to franchises, rights or stock of any railroad corporation or street railroad corporation, or other common carrier, shall be exercised by the commission which is authorized by this chapter to approve the issue of stock by such railroad corporation or street railroad corporation.

[Thus amended by ch. 788, L. 1911.]

Approval of issues of stock, bonds and other forms of indebtedness.

55. A common carrier, railroad corporation or street railroad corporation organized or existing, or hereafter incorporated under or by virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income, or from any other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, within five years next prior to the filing of an application with the proper commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made; provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labour to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been reasonably required for the purposes specified in the order, and that except as otherwise permitted in the order in the case of bonds, notes, and other evidence of indebtedness, such purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income; but this provision shall not apply to any lawful issue of stock, to the lawful execution and delivery of any mortgage or to the lawful issue of bonds thereunder, which shall have been duly approved by the board of railroad commissioners before July first, nineteen hundred and seven. Nothing herein contained shall prohibit the commission from giving its consent to the issue of bonds, notes or other evidence of indebtedness for the reimbursement of moneys heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements, prior to five years next preceding the filing of an application therefor, if in the judgment of the commission such consent should be granted, provided application for such consent shall be made prior to January first, nineteen hundred and twelve. For the purpose of enabling it to determine whether it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. Such corporation shall not without the consent of the commission apply said issue or any proceeds thereof to any purpose not specified in such order. Such common carrier, railroad corporation or street railroad corporation may issue notes, for proper corporate purposes and not in violation of any provision of this chapter or any other act, payable at periods of not more than twelve months without such consent, but no such notes shall, in whole or in part, directly or indirectly be refunded, by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve months without the

consent of the proper commission. Provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to a political subdivision thereof as the consideration for the grant of such franchise or right; nor shall the capital stock of a corporation formed by the merger or consolidation of two or more other corporations, exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger. Whenever it shall happen that any railroad corporation shall own or operate its lines in both districts it shall, under this section, apply to the commission of the second district. Whenever it shall happen that any street railroad corporation shall own or operate its lines in both districts, it shall, under this section, apply to the commission of the first district. Any other common carrier not operating exclusively in the first district shall apply to the commission of the second district.

55-a. I. Reorganizations of railroad corporations, street railroad corporations and common carriers pursuant to sections nine and ten of the stock corporation law and such other laws as may be enacted from time to time shall be subject to the supervision and control of the proper commission and no such reorganization shall be had without the authorization of such commission.

2. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the commission which, in making its determination, shall not exceed the fair value of the property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash, provided, however, that the commission may make due allowance for discount of bonds. Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the commission.

[Added by ch. 289, L. 1912.]

56. 1. Every common carrier, railroad corporation and street railroad corporation and all officers and agents of any common carrier, railroad corporation or street railroad corporation shall obey, observe and comply with every order made by the commission, under authority of this chapter so long as the same shall be and remain in force. Any common carrier, railroad corporation or street railroad corporation which shall violate any provision of this chapter, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the state of New York not to exceed the sum of five thousand dollars for each and every offense; every

violation of any such order or direction or requirement, or of this chapter, shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance thereof shall be and be deemed to be a separate and distinct offense.

2. Every officer and agent of any such common carrier or corporation who shall violate, or who procures, aids or abets any violation by any such common carrier or corporation of, any provision of this chapter, or who shall fail to obey, observe and comply with any order of the commission or any provision of an order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor.

Summary proceedings.

57. Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

Penalties for other than common carriers.

58. 1. Any corporation, other than a common carrier, railroad corporation or street railroad corporation, which shall violate any provision of this chapter, or shall fail to obey, observe and comply with every order made by the commission under authority of this chapter so long as the same shall be and remain in force, shall forfeit to the people of the state of New York a sum not exceeding one thousand dollars for each and every offense; every such violation shall be a separate and distinct offense, and the penalty or forfeiture thereof shall be recovered in an action as provided in section twenty-four of this chapter.

2. Every person who, either individually or acting as an officer or agent of a corporation other than a common carrier, railroad

corporation or street railroad corporation, shall violate any provision of this chapter, or fail to obey, observe or comply with any order made by the commission under this chapter so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this chapter, or in its failure to obey, observe or comply with any such order, shall be guilty of a misdemeanor.

3. In construing and enforcing the provisions of this chapter relating to forfeitures and penalties the act of any director, officer or other person acting for or employed by any common carrier, railroad corporation, street railroad corporation or corporation, acting within the scope of his official duties or employment, shall be in every case and be deemed to be the act of such common carrier, railroad corporation, street railroad corporation or corporation.

RULES OF PROCEDURE AND REGULATIONS GOVERNING MATTERS BEFORE THE PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT.

Adopted July 29, 1910. Effective September 1, 1910.

Rule VII. General Rules as to Application to the Commission by Companies.

1. All applications for the approval, determination, consent, permission, certificate or authorization of the Commission in cases where such approval, determination, consent, permission, certificate or authorization is required by law, shall be by petition, duly verified. Five copies of the petition shall also be filed. In all cases there must be annexed to the original petition certified or verified copies of the certificate of organization of every corporation directly affected by the proposed action, and certified copies of all such certificates, statements or records which modify, change or extend the purposes or powers of such corporations. When documents have already been filed with the Commission, the petitioner may, in lieu of filing additional copies, state in the petition such fact with the date of filing.

The petition must contain such further statements as are required by special provisions of law or by special rules governing the particular application and must show in detail compliance with all provisions of law as to such petition.

2. Upon the receipt of a petition required by this rule the same will be referred for examination. If it is found not to be correct in form, the Secretary will advise the applicant of the defects, who may correct the same. If the petition be found correct in form, the Commission will thereupon either make an order *ex parte* granting the application or will appoint a time and place for a public hearing. (See Rule IV.)

3. Where a hearing has been appointed the applicant may be required to publish in such papers and at such time as may be designated a notice of hearing to be known as "published notice of hearing" substantially in the form shown in Rule XX (5), and submitted for the approval of the Secretary to the Commission.

At or before the hearing the applicant must file with the Secretary to the Commission proof of due publication of such notice.

Rule VIII. Financial Condition Defined.

Wherever an applicant is required to set forth its financial condition, such financial condition shall be given so far as practically in proper schedules annexed to and

referred to and properly designated in the petition. Such schedules shall show the following:

- (1) Amount and kinds of stock authorized.
- (2) Amount and kinds of stock issued and outstanding.
- (3) Terms of preference of all preferred stock.
- (4) Brief description of each mortgage upon property of the applicant giving date of execution, name of mortgagor, name of mortgagee or trustee, amount of indebtedness authorized to be secured thereby and amount of indebtedness actually secured.
- (5) Number and amount of bonds authorized and issued, giving name of company which issued and describing each class separately, giving date of issue, par value, rate of interest, date of maturity and how secured.
- (6) Other indebtedness giving same by classes and describing security, if any. A brief statement showing devolution or assumption of any of the foregoing debts upon or by any person or corporation, if the original liability has been transferred.
- (7) Amount of interest paid during previous fiscal year and rate thereof. If different rates were paid, amount paid at each rate.
- (8) Rate and amount of dividends paid during previous five years.
- (9) Detailed statement of earnings and expenditures for and balance sheet showing conditions at the close of last fiscal year, unless already filed with the Commission as part of the annual report.

Rule XI. Application for the Permission and Approval of the Commission under Section 53 or 68 of the Act Except in a Case Covered by Rule X.

When application is made for permission and approval under Section 53 or 68 of the Public Service Commissions Law, except as governed by Rule X.

1. The petition in addition to the requirements of Rule VII, shall state:

(a) The facts showing compliance with all provisions of law respecting the organization of the applicant and its right to begin construction or exercise the franchise or right for which permission and approval are sought, and a reference to each and every document filed with the Commission affecting the same.

(b) The financial condition of the applicant as defined in Rule VIII and the proposed method of financing the proposed construction or operation.

(c) If consents of property owners are required to be obtained, whether such consents have been obtained and recorded and if recorded the time and place of record, or a certified copy of the report of the Commission appointed by the Appellate Division of the Supreme Court pursuant to Section 174 of the Railroad Law and the order of the Court thereon, if any.

(d) Whether the applicant, if a railroad corporation or street railroad corporation, has prior to June 6, 1907, received any certificate of public convenience and a necessity for any purpose and if so, a certified copy of the same should be annexed.

(e) If the application is for permission to exercise a franchise or right not theretofore lawfully exercised, the reason why such franchise or right has not been theretofore exercised.

(f) The facts showing that the construction or the exercise of the franchise or privilege for which the permission and approval of the Commission are sought is necessary or convenient for the public service.

2. With the petition shall be filed all documents, so far as pertinent to the application, enumerated in Rule X, Subdivision 2, a, b, c, d.

3. At the hearing proof must be made by the applicant of full compliance with all provisions of law respecting the organization of the applicant and its right to begin

the construction or extension proposed or to exercise the franchise or privilege for which the permission and approval of the Commission are sought; and that such construction or the exercise of such franchise or right is necessary or convenient for the public service; and in all cases proof must be made of the *bona fides* of the enterprise and of the financial ability of the applicant to make the construction or to operate or use the franchise or right in such a way as to benefit the public service.

Rule XII. Application under Section 54 or 70 of the Act for Approval of Assignment, Transfer or Lease of Franchise, Works or System.

When application is made for approval by the Commission of an assignment, transfer or lease of the franchise, works or system of an applicant;

1. The petition must be made by all of the parties to the proposed transaction and in addition to the requirements of Rule VII must state:

(a) The financial condition of each applicant as defined in Rule VIII.

(b) In detail the reasons upon the part of each applicant for making the proposed assignment, transfer, lease, contract or agreement and all the facts warranting the same and showing that it is for the benefit of the public service.

2. There must be annexed to the petition copies of the proposed assignment, contract, lease or agreement, and if any prior agreements have been made between the parties relating to the same subject matter copies of such agreements must be annexed to the petition or referred to therein as already on file with the Commission.

Rule XIII. Application under Section 54 or 70 of the Act for Authorization to Purchase or Acquire Stock.

When an application is made for authorization to purchase or acquire the stock of a corporation,

1. The petition must be made by the corporation proposing to acquire the stock and, in addition to the requirements of Rule VII, must set forth:

(a) The financial condition of the applicant and of the corporation whose stock is sought to be acquired or held, as defined in Rule VIII.

(b) The reasons why the applicant desires to make the purchase and the amount of such stock already owned or held by applicant.

(c) Price proposed to be paid for the stock, the names of the present owners and the terms of payment with the market value thereof, with highest and lowest price during the period of at least one year prior to the application, and dividends, if any, paid for a period of five years.

Rule XIV. Application under Section 55 or 69 of the Act for Approval to the Issuance of Securities.

When application is made for the consent of the Commission to the issuance of securities,

1. The petition, in addition to the requirements of Rule VII, shall set forth:

(a) The financial condition of the applicant as defined in Rule VIII, and a description of the road, plant or system and equipment of the applicant, and a statement of the cost of existing property and of the amount of any of its stock held by other corporations and their names, and the kinds of stock held by each.

(b) A statement of the amount and kind of stock which the corporation desires to issue, and, if preferred, the nature and extent of the preference, a statement of the amount of bonds, notes, and other evidences of indebtedness which the corporation desires to issue, the terms, the rate of interest and whether and how to be secured, and if to be secured by a mortgage or pledge, the terms thereof.

(c) A statement of the use to which the capital to be secured by the issue of such stock, bonds, notes or other evidence of indebtedness is to be put, with a definite statement of how much is to be used severally for the acquisition of property, the construction, completion, extension or improvement of facilities, the improvement of its service, the maintenance of its service, the discharge or refunding of its obligations, and the reimbursement of moneys actually expended from income or from any other moneys in the treasury as provided by Sections 55 and 69.

(d) A statement in detail of the property which is to be acquired with its value, a detailed description of the construction, completion, extension or improvement of facilities set forth in such a manner that an estimate may be made of its cost, a statement of the character of the improvement of its service proposed, and of the reasons why the service should be maintained from its capital; if it is proposed to discharge or refund its obligations or to reimburse moneys actually expended, a statement of the nature and description of such obligations and expenditures, including the par value of the obligations and the amount for which they were actually sold and the application of the proceeds and of the moneys expended, showing when, to whom and for what paid or applied.

(e) A statement showing whether any contracts have been made for the acquisition of such property, or for such construction, completion, extension or improvement of facilities, or for the reimbursement of expenditures, or for the disposition of any of the stock, bonds, notes or evidence of indebtedness which it is proposed to issue or the avails thereof, and if any such contracts have been made, copies thereof should be annexed to the petition.

(f) A statement showing whether any of the outstanding stock or bonds or other obligations of the company have been issued or used in capitalizing any franchise or any right to own, operate or enjoy any franchise or any contract for consolidation or lease, and if so, the amount thereof and the franchise, right, contract or lease so capitalized.

(g) If the stock is to be issued by a corporation formed by the merger or consolidation of two or more other corporations, the petition shall contain a complete statement of the financial condition of the corporations so to be merged or consolidated of the kind required by subdivision (a) hereinabove set forth, and of their capital stock at the par value thereof.

(h) The petition shall contain a statement of other facts pertinent to the application.

2. With the petition shall be filed:

(a) If application is in regard to an increase or reduction of capital stock, a certificate of the proceedings at the meeting of stockholders or unanimous consent of the stockholders as required by the Stock Corporations Law.

(b) If the application is in regard to a mortgage, proof of the consent of the stockholders under the Stock Corporations Law and the Railroad Law.

3. The order granting an application will:

(a) Prescribe the purposes for which securities or obligations authorized or the proceeds thereof shall be used.

(b) Direct the applicant to report under oath the sale or sales of the securities or obligations authorized, the terms and conditions of sale and the amounts realized therefrom.

(c) Require the applicant to make a verified report at least every six months showing in detail the use and application by it of the moneys so realized until such moneys shall have been fully expended.

Rule XVI. Application for Extension of Time to File Annual or Periodic Reports or Comply with an Order of the Commission.

When an application is made for extension of time within which to make and file any annual or periodic report with the Commission or to comply with an order of the Commission,

1. The petition, filed before the expiration of the period prescribed, shall be set forth in detail:

(a) What, if any, effort has been made by the applicant to prepare such report or to comply with the order;

(b) Any facts tending to show why the said report cannot be made and filed or the order complied with within the time prescribed;

(c) Any other facts which may make an extension of time necessary or proper;

(d) The further period of time deemed necessary by the applicant within which to make and file such report or to comply with the order.

2. The Commission may direct a hearing upon said petition and in that event the applicant shall attend before the Commissioner presiding and produce such witnesses and documents in the matter as the Commission shall require.

Amendment of Rules of Procedure and Regulations Governing Matters before the Commission—Standard Clauses—Additional Rules—Repeal of Rule XIV, sub-div. 3.

[The Commission on October 31, 1911, upon the report and recommendation of Commissioner Maltbie, adopted the following resolution prescribing standard forms of clauses to govern applications relative to the issuance of stock, bonds, notes and other evidences of indebtedness, including the approval of mortgages:

RESOLVED: That the said proposed standard clauses and rules as set out in the report be approved and adopted as amendments to the Rules of Procedure and Regulations governing matters before the Commission; that subdivision 3 of Rule XIV of the Rules of Procedure and Regulations, as adopted on July 29, 1910, be, and the same is, hereby repealed, as of this date; that the said additional rules as set forth in the report, be subdivisions 1, 2, 3, 4 and 5 of Rule XXI, and that the said standard clauses be subdivision 6 of Rule XXI, all as more fully shown in the said report.

In recommending the adoption of these standard forms and the additional rules relative thereto, the report by Commissioner Maltbie said:

“Since the enactment of the Public Service Commissions Law in 1907, this Commission has received and passed upon a considerable number of applications relating to the issuance of stocks, bonds, notes and other evidences of indebtedness and the approval of mortgages. The orders issued in the various cases have covered many phases of the subject. Numerous suggestions have been made from time to time as to the form of these orders and as to conditions which should be applied to different cases. Gradually the practice of the Com-

mission has crystallized until it is now possible to recommend the adoption of certain standard clauses and of rules relating thereto. Naturally, each case presents its peculiar set of facts and the order should be drawn with these in mind. The clauses recommended for adoption allow such latitude but provide for the application of the same general principles to all applications in the same class.”]

Rule XXI. Standard Clauses for Orders Approving Issuance of Stock, Bonds and Other Obligations.

1. *Orders for Approval of Stock.* All orders submitted to the Commission for the approval of stock shall contain standard clauses 1, 2, 10, 11, 12 and 14. (See subdiv. 6, Rule XXI.)

2. *Orders for Approval of Mortgage.* All orders submitted to the Commission for the approval of a mortgage shall contain standard clauses 3, 13 and 14. (See subdiv. 6, Rule XXI.)

3. *Orders for Approval of Bonds.* All orders submitted to the Commission for the approval of bonds, notes or other evidences of indebtedness shall contain standard clauses 4, 5 or 5-a, 6, 8 or 9, 10, 11, 12 and 14. (See subdiv. 6, Rule XXI.)

4. *Orders for Public Sale of Securities.* Every order submitted to the Commission for approval which provides for the public sale of securities shall contain clause 7. (See subdiv. 6, Rule XXI.)

5. *Compliance with Rules.* The Secretary shall advise the Commission before the adoption of an order approving a mortgage or the issuance of stock, bonds, notes or other evidences of indebtedness, that the above rules have been complied with.

6. *Forms Prescribed by Above Subdivisions of Rule XXI.*

CLAUSE 1. CERTIFICATE OF NECESSITY—STOCK.

Section . Application having been made to the Public Service Commission for the First District by.....
 Company under provisions of the [Railroad Law] [Public Service Commissions Law] for the consent of the Commission to the issuance by said company of.....
 capital stock to the amount of.....dollars (\$),
 par value, and a hearing having been duly held upon said application before the Commission, Honorable.....presiding; and it appearing to the Commission that the authorized capital stock of the said.....
Company has been duly increased from.....
 dollars (\$) to.....dollars (\$)
 of which.....dollars (\$), par value,
 have been issued and are outstanding; and it being now the opinion of the Commission:

(1) That the money to be procured by a further issue of stock is reasonably required for [acquisition of property], [construction, completion, extension or improvement of its facilities, plant or distributing system], [discharge or lawful refunding of its obligations] or [reimbursement of moneys actually expended from income or from other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes, or other evidence of indebtedness of such corporation, for the [[acquisition of property, construction, completion, extension or improvement of its facilities, plant or distributing system or discharge or lawful refunding of its obligations]]], and particularly for the purposes which are hereinafter stated in this order, and

(2) That said purposes are not in whole or in part reasonably chargeable to operating expenses or to income;

CLAUSE 2. AUTHORITY TO ISSUE—STOCK.

Section . It is ORDERED, that the.....
 Company be and hereby is authorized to issue its.....stock to
 the amount of.....dollars (\$),
 par value; that all the stock hereby authorized shall be.....stock
 of said company to be issued for money.....;
 and that the proceeds thereof shall be applied only to the following purposes, that is
 to say:

- | | |
|--|----|
| (1) For acquisition of property described as follows: | \$ |
| (2) For acquisition of property to replace property of
the company, the property so acquired being described as
follows: | \$ |
| (3) For maintenance of service..... | \$ |
| (4) For discharge or refunding of obligations of the
company incurred for: | \$ |
| (a) Acquisition of property..... | \$ |
| (b) Construction, completion, extension or im-
provement of its facilities, plant or distributing system. | \$ |
| (c) Maintenance of service..... | \$ |
| (d) Replacement of property of the company..... | \$ |
| (5) For reimbursement of moneys expended from
income or such other moneys in the treasury for: | \$ |
| (a) Acquisition of property..... | \$ |
| (b) Construction, completion, extension or im-
provement of its facilities, plant or distributing system. | \$ |
| (c) Discharge of its obligations..... | \$ |
| Total..... | \$ |

CLAUSE 3. APPROVAL OF MORTGAGE.

Section . Application having been made to the Public Service Commission
 for the First District by.....
 Company under provisions of the [Railroad Law] [Public Service Commissions Law]
 for the consent of the Commission to the execution and issuance by said company of
 a mortgage to....., as trustee, and a
 hearing having been duly held upon said application before the Commission,
 Honorable.....presiding; and it appearing to the Commission that
 the owners of capital stock of said.....Company
 to an amount equal to that required by the statute have consented to the issuance of
 said mortgage;

Section . It is ORDERED that the Public Service Commission for the First
 District does hereby consent to the issuance and execution by said.....
 Company unto said....., as
 trustee, of a.....mortgage, said mortgage to be dated as of the
day of....., 191., to secure an issue of.....
dollars (\$) of bonds of said.....
 Company, said bonds to be dated as of the.....
 day of.....191., and to be payable on the.....day of
, 19., redeemable at.....() per cent of the par value
 thereof and accrued interest, and the said bonds to bear interest at.....()

per cent per annum, payable.....annually upon the terms and conditions in said mortgage set forth and contained. The form of such mortgage submitted by saidCompany to the Commission is hereby approved and ordered filed and properly identified by re-reference thereon to the resolution under authority of which this order is issued. Said company, however, shall have no right or authority to issue any bonds pursuant to the terms of said mortgage except as hereafter authorized by the Commission.

CLAUSE 4. CERTIFICATE OF NECESSITY—BONDS, ETC.

Section . Application having been made to the Public Service Commission for the First District by..... Company under provisions of the [Railroad Law] [Public Service Commissions Law] for the consent of the Commission to the issuance by said company of [bonds] [notes] [or other evidence of indebtedness] to the amount of.....dollars (\$), face value, said [bonds] [notes, etc.] to be payable on theday of....., 19.., and to bear interest at.....() per cent per annum, payable.....annually and secured by a..... mortgage upon all the property of the company; and a hearing having been duly held upon said application before the Commission, Honorable..... presiding; and it being now the opinion of the Commission:

(1) That the money to be procured by the issue of said [bonds] [notes] [or other evidence of indebtedness] of the said.....Company to the amount of.....dollars (\$) face value, payable at a period of more than twelve months after the date thereof, is necessary to and reasonably required by said company for the [acquisition of property], [construction, completion, extension or improvement of its facilities, plant or distributing system], [improvement or maintenance of its service], [discharge or lawful refunding of its obligations] or [reimbursement of moneys actually expended from income or from other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, for the [[acquisition of property, construction, completion, extension or improvement of its facilities, plant or distributing system or discharge or lawful refunding of its obligations]]], and particularly for the purposes which are hereinafter stated in this order; and

(2) That, except as to the following specified amounts of said [bonds], [notes], [or other evidence of indebtedness] authorized to be issued hereunder to procure money for the purposes following, to wit:

- \$....., or so much thereof as may be necessary, to pay expenses of sale and make up discount;
 - \$.....for maintenance of service;
 - \$.....for acquisition of property to replace property of the company;
 - \$....., or so much thereof as in the opinion of the Commission may be necessary, to discharge or refund obligations of the company incurred for [maintenance of service] [acquisition of property to replace property of the company],
- said purposes are not in whole or in part reasonably chargeable to operating expenses or to income;

CLAUSE 5. AUTHORITY TO ISSUE BONDS, ETC.

Section . It is ORDERED, that the Public Service Commission for the First District does hereby authorize the issue by the said..... Company of.....dollars

(\$) face value of principal of [bonds] [notes] [or other evidence of indebtedness] of said company, maturing the.....day of..... 19.., redeemable at any time after the.....day of....., 19.., at() per cent of the par or face value thereof besides accrued interest, and to bear interest at.....() per cent per annum, payableannually under and in pursuance of the terms of the mortgage hereby approved, to be made and executed by the said..... Company to....., as trustee.

CLAUSE 5a. AUTHORITY TO ISSUE BONDS, ETC.

Section . It is ORDERED, that the Public Service Commission for the First District does hereby authorize the issue by the said..... Company of.....dollars (\$) face value of principal of [bonds] [notes, etc.] of said company, maturing theday of....., 19.., redeemable at any time after the..... day of....., 19.., at.....() per cent of the par or face value thereof besides accrued interest and to bear interest at.....() per cent per annum, payable.....annually, under and in pursuance of the terms of the mortgage heretofore and on.....day of , 191.., made and executed by the said..... Company to the....., as trustee.

CLAUSE 6. PURPOSES OF ISSUE.

Section . It is ORDERED, that said issue of [stock] [bonds] [notes, etc.] is authorized upon the conditions following and not otherwise, to wit:

First: That the said.....Company shall sell the said [bonds] [notes, etc.] hereby authorized so as to net the said company not less than.....() per cent of the par value of the principal thereof besides interest accrued thereon, and that the proceeds thereof shall be applied only to the following purposes, that is to say:

- (1) For acquisition of property described as follows: \$
- (2) For acquisition of property to replace property of the company, the property so acquired being described as follows: \$
- (3) For maintenance of service..... \$
- (4) For discharge or refunding of obligations of the company incurred for:
 - (a) Acquisition of property..... \$
 - (b) Construction, completion, extension or improvement of its facilities, plant or distributing system. \$
 - (c) Maintenance of service..... \$
 - (d) Replacement of property of the company.... \$
- (5) For reimbursement of moneys expended from income or such other moneys in the treasury for:
 - (a) Acquisition of property..... \$
 - (b) Construction, completion, extension or improvement of its facilities, plant or distributing system. \$
 - (c) Discharge of its obligations..... \$
- (6) For expenses of sale of bonds hereby authorized and to make up the discount or deficiency, if any, in the

amount realized from the sale to net not less than.....
() per cent of par of the bonds sold for the purposes
specified in subdivisions.....() and.....
() of Section.....() and to be applied pro
rata for the purposes therein stated, not exceeding the
sum of..... \$

Total..... \$

CLAUSE 7. PUBLIC SALE OF SECURITIES.

Second: That no [bonds] [notes, etc.] authorized hereunder shall be sold by the company for less than.....() per cent of par with interest accrued thereon, unless the same shall be first offered to public subscription as herein provided. Whenever the company shall desire to sell [bonds] [notes, etc.] issued hereunder except for not less than.....() per cent of par and accrued interest, the treasurer of the company shall invite proposals for the purchase of such [bonds] [notes, etc.] by public advertisement for not less than once a week for four successive weeks in at least four daily newspapers published in the City of New York and shall award the same to the highest bidder or bidders therefor. The said proposals shall only be publicly opened by the treasurer of the company and in the presence of the Public Service Commissioners for the First District or such of them as shall attend at the time and place specified in such public advertisement. It shall be a condition of said sale (and the advertisement calling for proposals therefor shall so declare) that any bidder may bid for all or none of said bonds at one price, or for all or any portion at one price, or for portions at different prices, and any bidder who shall bid for a portion of said [bonds] [notes, etc.] may be required to accept a part of the portion bid for by him at the same rate as may be specified in his bid, and any bid which conflicts with this condition may be rejected; and if the board of directors deem it to be in the interest of the company so to do, they may award the [bonds] [notes, etc.] to the bidder offering the highest price for all or a number of the said [bonds] [notes, etc.], and provided also that if the board of directors deem it to be in the interest of the company they may reject all bids. The board of directors may prescribe such other conditions incident to and providing for the proposal for the purchase of [bonds] [notes, etc.] as it may see fit.

CLAUSE 8. SINKING FUND AND PAYMENTS.

Third: That to provide for.....said
.....Company shall establish and maintain a cumulative sinking fund, and that for said purpose said company shall pay in cash into said fund out of revenue at least.....
dollars (\$), beginning on the.....day of.....
191.., and on the.....day of.....in each and every year thereafter, and continuing until the.....day of....., 19...
or until said fund with accumulations shall have aggregated.....
.....dollars (\$). Said company shall use the cash funds in said sinking fund for the acquisition, at the authorized price of issue, of bonds issued by said company directly to said fund. Said company shall, if there are cash funds in said sinking fund not either used or required for the purchase of bonds, as hereinbefore provided, use such funds for the purchase of bonds in the following manner: Between.....and.....of each year said company shall cause an advertisement to be inserted in at least two newspapers of general circulation published in the Borough of Manhattan, City of New York, once in each week for four successive weeks, that the company will purchase upon
.....for the sinking fund to the extent of the cash sinking fund in

its hands, bonds of said company then outstanding, at the lowest price for which the same shall be offered, not exceeding.....() per cent of the par value thereof, besides interest accrued thereon. Upon..... said company shall apply the cash in sinking fund then in its hands to the purchase of bonds of said company with unmatured coupons attached tendered to it as aforesaid, at not exceeding.....() per cent of the face value thereof, besides the interest accrued thereon, giving preference in said purchases to the bonds which shall be offered at the lowest price; and in case bonds shall be offered by two or more holders at the same price, to an amount in the aggregate exceeding the cash in sinking fund applicable thereto, then giving preference to such bonds in the order of the date of the reception by said company of the offer to sell the same. If there are any cash funds in said sinking fund not used or required for the acquisition of bonds, as hereinbefore provided, said company may invest said funds or any portion thereof in such manner and under such conditions as may be approved by the Public Service Commission for the First District. Any cash funds remaining in the sinking fund after application as hereinbefore provided shall be deposited in bank in a separate fund. All bonds and coupons acquired for the sinking fund shall be stamped as irrevocably belonging to the sinking fund and shall not again be issued. Said coupons shall be detached when and as said coupons become due and payable and shall be delivered to the treasurer of said company as evidence that the respective amounts have been paid into the said sinking fund, and said company shall pay into said sinking fund the amounts indicated by said coupons when and as they become due and payable.

CLAUSE 9. AMORTIZATION FUND.

Fourth: That all discounts, commissions and expenses in connection with the approval, issuance and sale of the said [bonds] [notes, etc.] authorized to be issued under this order not to exceed.....dollars (\$) shall be amortized out of the income of the company before theday of....., 19..., by the payment of [a monthly] [an annual] instalment, so long as may be necessary, of an amount not less than....., such [monthly] [annual] instalment to begin.....

CLAUSE 10. ACCOUNTS, REPORTS AND AUDIT.

Fifth: That said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the [stock] [bonds] [notes, etc.] hereby authorized to be issued and on or before the tenth day of each month the company shall make verified reports to the Commission stating the sale or sales of said [stock] [bonds] [notes, etc.] during the previous month, the terms and conditions of sale, the moneys realized therefrom, and the use and application of such moneys; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

CLAUSE 11. WITHDRAWAL OF FUNDS ON APPROVAL.

Sixth: That none of the proceeds of the aforementioned [stocks], [bonds], [notes, etc.] hereby authorized for the purposes specified in subdivision.....of paragraph.....of section.....of this order, other than the receipts on account of accrued interest, shall be expended by the said company for the purposes specified therein until a properly itemized bill for each proposed expenditure shall have been submitted to the Commission by the company with the certificate of one of its officers that such expenditure represents a real increase in its fixed capital as defined in the accounting rules of the Commission and not a replacement of any part of

such fixed capital or a substitution for wasted capital or other loss properly chargeable to income, and until such bill shall have been approved by the Commission.

CLAUSE 12. LIMIT OF AUTHORITY.

Seventh: That the authority hereby given to issue such [stock] [bonds] [notes, etc.] shall apply only to [stock] [bonds] [notes, etc.] issued by the said company on or before the [thirtieth day of June] [thirty-first day of December], 191...

CLAUSE 13. FILING OF MORTGAGE.

Eight: That a duplicate original of the mortgage consented to and authorized as aforesaid upon execution thereof be filed by the petitioner with the Secretary of this Commission.

CLAUSE 14. ACCEPTANCE OF ORDERS.

Section . It is ORDERED, that this order take effect on the..... day of....., 191.., and except as provided in the..... paragraph of section.....limiting the duration of the authority to issue such [stock] [bonds] [notes, etc.] herein granted, continue in force until otherwise ordered by the Commission, and that within ten days after service upon it of a copy of this order said company notify the Commission whether the terms of this order are accepted and will be obeyed.

RULES OF PRACTICE BEFORE THE PUBLIC SERVICE COMMISSION, SECOND DISTRICT, STATE OF NEW YORK, ADOPTED AND PRESCRIBED BY THE COMMISSION, PURSUANT TO SECTION TWENTY OF THE PUBLIC SERVICE COMMISSIONS LAW.

RULE 21.

Applications under section 54 of the public service commissions law for approval of assignment, transfer or lease of franchise.—In all applications under section 54 for approval of assignment, transfer or lease of franchise, or right to or under any franchise to own or operate a railroad or street railroad, or for approval of any contract or agreement with reference to or affecting any such transfer or right, the petition must be made by all the parties to the proposed transaction, and must show:

1. The financial condition of each applicant.

2. In detail the reasons upon the part of each applicant for making the proposed assignment, transfer, lease, contract or agreement and all the facts warranting the same, and all facts which should be known by the commission to enable it to pass upon the application. The petition must be accompanied by copies of the articles of incorporation of each applicant, certified by the Secretary of State, and of the franchise, contract or agreement annexed as schedules thereto.

RULE 22.

Applications under section 54 of the public service commissions law for authorization to purchase or acquire capital stock of any domestic railroad corporation, street railroad corporation, or other common carrier.—In all applications for authorization to purchase or acquire capital stock of any domestic railroad corporation or other common carrier, the petition must show:

1. In detail the reasons why the applicant desires to make the proposed purchase and all the facts warranting the same, including amount of such stock already owned by the applicant.

2. The market value of the stock proposed to be purchased with highest and lowest price during a period of at least one year prior to the making of the petition, dividends, if any, paid for a period of five years prior to making of petition, the price proposed to be paid, the name of the present owner and the terms of payment.

3. In case of an application for authorization to purchase stock of a certain description as opportunity may offer, the reasons therefor in full detail, with a statement of market values and dividends paid for at least five years prior to making of petition and the maximum price which the petitioner should be allowed to pay.

4. In all cases there must be submitted a copy of the articles of incorporation of the corporation whose stock is proposed to be purchased, certified by the Secretary of State, and a statement showing the amount of stock issued and the financial condition of the corporation issuing the same.

RULE 23.

Applications for consent to mortgage property and franchises pursuant to subdivision 10, section 4 of the railroad law.—An application for consent to mortgage property and franchises pursuant to subdivision 10, section 4 of the railroad law, may be embraced in one petition and may be carried on in one proceeding with an application for an order authorizing the issue of bonds or other evidence of indebtedness to be secured by the proposed mortgage. If the application be for consent to mortgage only, it will be governed by the provisions of rule 24. In every case the petition must be accompanied by proof of the consent of the stockholders required by law and by a copy of the proposed mortgage.

RULE 24.

Applications under section 55 of the public service commissions law for an order authorizing the issue of stocks, bonds, notes or other evidence of indebtedness.—In applications under section 55 of the public service commissions law for an order authorizing the issue of stocks, bonds, notes or other evidence of indebtedness, the petition must show:—

1. Amount and terms of proposed issue and purposes for which the proceeds are to be used.

2. If the purpose is the acquisition of property, a general description of the property, from whom to be acquired and terms of the contract for such acquisition if any has been made. Names of owners of property to be acquired for right of way need not be set out, but a general description of the proposed route should be given.

3. If the purpose is for the construction, completion, extension or improvement of facilities, the existing facilities must be concisely set forth as well as those proposed.

4. If the purpose is the improvement or maintenance of service, the existing service must be concisely set forth as well as the improvements or betterments proposed.

5. If the purpose is the refunding of obligations such obligations must be described fully, showing amount, date of issue, date of maturity and all other material facts concerning the same.

6. The financial condition of the applicant.

7. If the application is for authorization of bonds to be secured by an existing mortgage, amount of bonds, if any, already issued upon such security and amount and application made of proceeds of same.

8. If the proceeds are to be used for construction purposes, the affidavit of a competent person must be annexed showing the estimated cost of such construction in reasonable detail.

9. In applications for the issue of stock the petition must state that no franchise is capitalized directly or indirectly, except as the same is authorized by section 55 of the public service commissions law. In case it is proposed to capitalize any franchise as therein authorized there shall be filed with the petition a verified copy of such franchise and an affidavit of the proper officer of the State or municipality granting the same, showing the amount that has been actually paid for such franchise.

10. If any contract, agreement or arrangement, verbal or written, has been made to sell the stock, bonds, notes or other evidence of indebtedness proposed to be issued, such contract, agreement or arrangement must be set out in full, with copy of the same, if in writing.

11. If no contract, agreement or arrangement has been made for the sale or disposal of the stock, bonds, notes or other evidence of indebtedness proposed to be issued, there must be annexed an affidavit of a competent person showing the amount which can probably be realized from the sale or disposition thereof, and the reasons for the opinion of the affiant.

There must be annexed to the petition an affidavit made by at least three of the directors of the applicant, showing that it is the intention of the applicant in good faith to use the proceeds of the stock, bonds, notes or other evidence of indebtedness proposed to be issued, for the purposes set forth in the petition.

RULE 25.

Applications under section 55, for authorization, etc., continued.—The order granting an application, or any part thereof, under section 55, shall contain the following provisions:—

1. Prescribing the purposes for which the proceeds of the security or obligation authorized shall be used.

2. Directing the applicant to report under oath the sale or sales of the obligations authorized, the terms and conditions of such sale and the amount realized therefrom.

3. That the applicant shall make a verified report at least once every six months showing in detail the use and application by it of the moneys so realized, until such moneys shall have been fully expended.

4. Such other provisions as the commission may deem necessary or appropriate in each case.

APPENDIX J.

WISCONSIN LEGISLATION.

STOCK AND BOND LAW CH. 593, LAWS OF 1911.—APPLYING TO PUBLIC UTILITY COMPANIES, PUBLISHED BY THE RAILROAD COMMISSION OF WISCONSIN, JULY, 1911.

SECTION 1.—Sections 1753—1 to 1753—13, inclusive of the statutes are repealed.

SECTION 2.—There are added to the statutes twenty-two new sections to read:

The term 'public service corporation' when used in this act shall mean and embrace every railroad, street railway, telegraph, telephone, express, freight line, sleeping car, light, heat, water, and power corporation, and all other corporations, excepting towns, villages, and cities, engaged in the business of supplying the public, directly or indirectly, with light, heat, power, or water, or in transmitting telegraph or telephone messages, or in transporting passengers, freight, or express; the term 'commission' when used in this act shall mean the railroad commission of Wisconsin; the term 'capital account' when used in this act shall mean the capital account prescribed by the commission and required to be kept by every public service corporation as provided by law; the term 'net income or revenue' when used in this act shall mean the money available for dividends and surplus according to the accounts prescribed by the commission and required to be kept by every public service corporation.

The power to create liens on corporate property by public service corporations in this state is a special privilege, the right of supervision, regulation, restriction, and control of which shall be vested in the state, and such power shall be exercised according to the provisions of these statutes.

Except as otherwise provided herein, the provisions of this act shall apply to the issue by public service corporations of stocks, certificates of stock, bonds, notes or other evidences of indebtedness payable at periods of more than one year after the date thereof.

No public service corporation shall hereafter issue for any purposes connected with or relating to any part of its business, any stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, to an amount exceeding that which may from time to time be reasonably necessary for the purpose for which such issue of stock, certificates of stock, bonds, notes, or other evidences of indebtedness may be authorized.

A public service corporation may issue stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, when necessary for organization expenses and all other expenses reasonably required in connection with the financing and construction of its

property, for the acquisition of property, the construction, completion, extension, or improvement of its plant, distributing system, or facilities, or for the improvement of its service, or for the discharge or refunding of its legal obligations, or in case of railroad corporation for any of the purposes stated in section 1826 or subsection 10 of section 1828 of the statutes, provided, however, that no such corporation shall issue any stocks or certificates of stock for any purpose which is not properly chargeable to its capital account; and that if any such corporation shall issue any bonds, notes, or other evidences of indebtedness for any lawful purpose which is not properly chargeable to its capital account, it shall set aside annually from its net income or revenue, if any, such a sum that when such bonds, notes, or other evidences of indebtedness shall become due and payable, the total amount of said sums so set aside shall be sufficient to pay and discharge the same.

Purposes for which stocks, bonds, etc., may not be issued.
Section 1753.—6.

No public service corporation shall issue any stocks, certificates of stock, bonds, notes, or other evidences of indebtedness for the purpose of paying, discharging, refunding, exchanging for, or retiring, in whole or in part, directly or indirectly, any of its bonds, notes, or other evidences of indebtedness, payable at periods of less than one year after the date thereof, which were issued for purposes not properly chargeable to its capital account.

Consideration for stocks and bonds.
Section 1753.—7.

No public service corporation shall issue any stock or certificate of stock except in consideration of money, or of labour or property, at its true money value, as found and determined by the commission as in this act provided, actually received by it, equal to the face value thereof, or any bonds, notes, or other evidences of indebtedness except for money, or for labour or property estimated at its true money value, as found and determined by the commission as in this act provided, actually received by it equal to a sum not less than seventy-five per cent of the face value thereof, provided, however, that no bonds, notes or other evidences of indebtedness of any such corporation issued for the purpose of refunding, retiring, or discharging any of its bonds, notes, or other evidences of indebtedness, shall be issued at less than seventy-five per cent of the face value thereof, plus the amount of any discount hereafter paid or incurred by such corporation upon the issuance of the bonds, notes, or other evidences of indebtedness to be refunded, retired, or discharged. All stocks, certificates of stocks, bonds, notes, and other evidences of indebtedness, of any public service corporation issued contrary to the provisions of this act shall be void.

Bonds to bear reasonable proportion to stock.
Section 1753.—8.

The amount of bonds, notes, or other evidences of indebtedness which any public service corporation may issue shall bear a reasonable proportion to the amount of stock and certificates of stock issued by such corporation, due consideration being given to the nature of the business in which the corporation is engaged, its credit and future prospects, the effect which such issue will have upon the management and efficient operation of the corporation by reason of the relative amount of financial interest which the stockholders will have in the corporation, and the circumstances surrounding the operation and business of the corporation.

Issues for money only, proceedings, statement by

1. No public service corporation shall hereafter issue any stocks, certificates of stock, bonds, notes, or any other evidences of indebted-

ness, except such as are issued for money only and payable one year or less from the date thereof, until it shall have first obtained authority for such issue from the commission, as herein provided. The proceedings for obtaining a certificate of such authority from the commission and the conditions of its being granted by the commission shall be as follows: In case the stocks, certificates of stock, bonds, notes, or other evidences of indebtedness are payable at periods of more than one year after the date thereof, and are to be issued for money only, the corporation shall file with the commission a statement, signed and verified by its president and secretary, setting forth (a) the amount and character of the proposed stocks, certificates of stock, bonds, notes, or other evidences of indebtedness; (b) the purposes for which they are to be issued; (c) the terms on which they are to be issued, and (d) the total assets and liabilities, and the previous financial operations and business of the corporation, in such detail as the commission may require.

2. The signers of the articles of association of a public service corporation hereafter organized may sign and verify such statement in the first instance. For the purpose of enabling it to determine whether the proposed issue complies with the provisions of this act, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents, or contracts, as it may deem of importance in enabling it to reach a determination. It may also make a valuation of all the property of the corporation if it deems it pertinent to the inquiry or investigation. It shall find and determine the amount of such stock, certificates of stock, bonds, notes, or other evidences of indebtedness, reasonably necessary for the purposes for which the same are to be issued.

3. If the commission shall determine that such proposed issue complies with the provisions of this act such authority shall thereupon be granted, and it shall issue to the corporation a certificate of authority, stating: (a) the amount of such stocks, certificates of stock, bonds, notes, or other evidences of indebtedness reasonably necessary for the purposes for which they are to be issued, and the character of the same; (b) the purposes for which they are to be issued, and (c) the terms upon which they are to be issued. Such corporation shall not apply the proceeds of such stock, bonds, notes, or other evidences of indebtedness as aforesaid, to any purposes not specified in such certificate, nor issue such stock, bonds, notes, or other evidences of indebtedness, on any terms not specified in such certificate.

4. In case the stocks, certificates of stock, bonds, notes or other evidences of indebtedness, payable in more than one year after the date thereof or payable in less than one year from the date thereof when issued for purposes properly chargeable to its capital account, are to be issued, partly or wholly for property or services or other consideration than money, the corporation shall file with the commission a statement, signed and verified by its president and secretary, setting forth (a) the amount and character of the stocks, certificates of stock, bonds, notes, or other evidences of indebtedness proposed to be issued; (b) the purposes for which they are to be issued; (c) the description in detail and estimated value of the property or services for which they are to be issued;

corporation. Section 1753.—9.

Incorporators may petition, issues for money only, commission's investigation and valuation.

Issues for money only, commission's certificate.

Issued for other than money, corporation's statements.

(d) the terms on which they are to be issued or exchanged; (e) the amount of money, if any, to be received for the same, in addition to such property, services, or other consideration, and (f) the total assets and liabilities, and the previous financial operations and business of the corporation, in such detail as the commission may require.

Issued for other than money, commission's investigation and valuation.

5. The signers of the articles of association of a public service corporation hereafter organized, may sign and verify such statement, in the first instance. For the purpose of enabling it to determine whether the proposed issue complies with the provisions of this act, the commission shall determine the true valuation, in detail, of the property, services, or other consideration other than money, for which it is proposed to issue, in whole or in part, such stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, and shall make such inquiry or investigation, hold such hearings, and examine such witnesses, books, papers, documents, or contracts as it may deem of importance in enabling it to reach a determination.

Issues for other than money, commission's certificate.

6. If the commission shall determine that the proposed issue complies with the provisions of this act, such authority shall thereupon be granted and it shall issue to the corporation a certificate of authority stating: (a) the amount of such stocks, certificates of stock, bonds, notes, or other evidences of indebtedness reasonably necessary for the purposes for which they are to be issued, and the character of the same; (b) the purposes for which they are to be issued; (c) the terms upon which they are to be issued, and (d) the true value of the property, services, or other consideration than money (which shall be described in detail) as found and determined by the commission, for which, in whole or in part, such issue is to be made.

Application of proceeds.

7. Such corporation shall not apply the proceeds of the sale of such stock, bonds, notes, or other evidences of indebtedness as aforesaid to any purpose not specified in such certificate, nor issue such stock, bonds, notes, or other evidences of indebtedness on any terms not specified in such certificate, and no property, services, or other consideration than money shall be taken in payment to the corporation for such stock, certificates of stock, bonds, notes or other evidences of indebtedness, except at the true value of such property, services, or other consideration than money, as found and determined by the commission and stated in said certificate.

Mortgage of bonds notes, etc. Section 1753.—10.

Nothing in section 1753—9 contained, shall be construed to prohibit the commission from authorizing in such certificate the mortgage or pledge by any public service corporation of any bond, note, or other evidence of indebtedness issued by such corporation as security for or as part security for any bond, note, or other evidence of indebtedness issued by or loan made to such corporation which shall not be issued or made in violation of the provisions of this act, provided that the terms of said loan and of such notes, bonds, or other evidences of indebtedness shall provide that none of said pledged bonds, notes, or other evidences of indebtedness shall, upon non-payment of the notes, bonds, or other evidences of indebtedness which they are pledged to secure, or upon non-performance of any of the conditions thereof, be sold, or become the property of the

holders of the notes, bonds, or other evidences of indebtedness so secured, either directly or through a trustee for their benefit, except at or through public sale, notice whereof shall be published once a week for not less than three successive weeks prior thereto, in at least one newspaper of general circulation printed in the English language and published in the place where such sale shall take place, and except at a sum not less than seventy-five per cent of the face value thereof, plus the discount, if any, paid or incurred by the corporation upon the notes, bonds, or other evidence of indebtedness which they are pledged to secure.

1. Any person or association of persons, which shall have, or may hereafter become the owner or assignee of the rights, powers, privileges, and franchise of any public service corporation, created or organized by or under any law of this state, by purchase under a mortgage sale, sale in bankrupt proceedings, or sale under any judgment, order, decree, or proceedings of any court in this state, including the courts of the United States sitting herein, must, within sixty days after such purchase or assignment, organize anew by filing articles of organization as provided by law respecting corporations for similar purposes, and thereupon shall have the rights, privileges, and franchises which such corporation had, or was entitled to have, at the time of such purchase and sale, and such as are provided by those statutes applicable thereto. The new organization may issue stock, certificates of stock and bonds for the property of the former corporation thus acquired, in an amount not to exceed the true value of such property, as found and determined by the commission, and stated in the certificate of authority issued to such corporation, in accordance with the provisions of subsections 5 and 6 of section 1753—9 of the statutes.

Reorganization required on forced sale, valuation to be made by commission. Section 1753.—11.

2. No public service corporation shall purchase, directly or indirectly, or in any way acquire the property of any other public service corporation or of any person furnishing service to the public, for the purpose of effecting a consolidation, except that the property of such corporation or person shall first be valued as provided in subsection 5 of section 1753—9 of the statutes, and then only at a sum not to exceed the value found and determined by the commission and stated in the certificate of authority issued to such corporation for the issuance of stocks, certificates of stock, bonds, notes, or other evidences of indebtedness.

Consolidations, commission's valuation first required.

No public service corporation shall issue any stocks, certificates of stock, bonds, notes or other evidences of indebtedness for money, property, or services, either directly or indirectly, until there shall have been recorded upon the books of such corporation the certificate of the commission herein provided for.

Corporation to record certificate. Section 1753.—12.

The commission shall have the power to require public service corporations to account for the disposition of the proceeds of all sales of stocks, certificates of stock, bonds, notes, and other evidences of indebtedness, issued pursuant to this act, in such form and detail as it may deem advisable, and to do and perform any and all acts necessary to carry out the provisions of this act.

Disposition of proceeds, commission may require account for. Section 1753.—13.

Bond, stock or scrip dividend prohibited. Section 1753.—14.

No public service corporation shall declare any stock, bond, or scrip dividend, or divide the proceeds of the sale of any stock, bond, or scrip among its stockholders.

Appraisal of municipal franchises. Section 1753.—15.

In determining the value of the property of a public service corporation or any person furnishing service to the public for the purposes of this act, no franchise to a corporation and no franchise or privilege granted to such corporation by the state or a municipality shall be appraised, fixed, or considered at any greater sum or value than the sum paid therefor into the public treasury of the state or the municipality granting the same.

Appeal. Section 1753.—16.

Any such public service corporation, if dissatisfied with any valuation made by the commission, or any order or certificate made or issued by it, may commence an action in the circuit court of Dane county against the commission, as defendant, to vacate and set aside such valuation, order, or certificate on the ground that the same is unreasonable or unlawful, in which action the complaint shall be served with the summons. Sections 1797—16 and 1797—17 of the statutes shall apply to all the rights of the parties to the proceeding in such action.

Corporation and agents, penalty for unlawful issues and applications. Section 1753.—17.

Any public service corporation as herein defined, or any agent, director, or officer thereof, who shall directly or indirectly, issue or cause to be issued, any stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, contrary to the provisions of this act, or who shall apply the proceeds from the sale thereof to any purposes other than that specified in the certificate of the commission, as herein provided, shall forfeit and pay into the state treasury not less than five hundred dollars nor more than ten thousand dollars for each offense.

Corporation officers, penalty for false statements and violations. Section 1753.—18.

Each and every director, president, secretary, or other official or agent of any such public service corporation, who shall make any false statement to secure the issue of any stock, certificates of stock, bond, note, or other evidence of indebtedness, or who shall by false statement knowingly made, procure of the commission the making of the certificate herein provided, or issue with knowledge of such fraud, negotiate, or cause to be negotiated any such bond or other issue, in violation of these statutes, shall be guilty of a felony and upon conviction thereof, shall be punished by a fine of not less than five hundred dollars, or by imprisonment in the state prison for a term of not less than one nor more than ten years, or by both such fine and imprisonment in the discretion of the court.

To apply to all stocks, bonds, etc., not actually issued or delivered. Section 1753.—19.

All stocks, certificates of stock, bonds, notes, or other evidences of indebtedness issued or delivered by any public service corporation, after this act takes effect, upon the authority of any articles of incorporation or amendments thereto or vote of the stockholders or directors filed, taken or had previous to the taking effect of this act, shall be void unless the certificate provided for by this act shall have been obtained from the commission prior to such issue or delivery. The burden of proof shall be upon any party claiming any exemption under this act.

1. Any public service corporation may provide for preferred stock in its original articles of organization, or by amendment thereto adopted by the affirmative vote of the holders of not less than two-thirds of the outstanding stock, and may in such articles, or by such amendment thereto adopted by the affirmative vote of the holders of two-thirds of the outstanding stock, provide for the increase of the amount of preferred stock theretofore authorized and provide for the payment of dividends on all preferred stock, whenever so authorized, out of the profits at a specified rate not to exceed eight per centum per annum, before dividends are paid upon the common stock; for the accumulation of such dividends; for a preference of such preferred stock, not, however, exceeding the par value thereof over the common stock in the distribution of the corporate assets other than profits; for the redemption of such preferred stock at a sum not to exceed the face value thereof, and any accumulations and unpaid dividends, if said stock provides for the accumulation of dividends; and for denying or restricting the voting power of such preferred stock.

Preferred stock.
Section 1753.—20.

2. Neither preferred nor common stock shall bear interest. Certificates of preferred stock and common stock shall state on the face thereof all privileges accorded to and all restrictions imposed on preferred stock. No change or amendment in relation to such preferred stock shall be made, except by way of amendment to the articles of organization, adopted by the affirmative vote of the holders of two-thirds of all outstanding stock, both preferred and common, at a special meeting called therefor in accordance with the provisions of the articles of incorporation and the by-laws of said company.

Stock not to
bear interest,
preferred stock
privileges to be
printed on cer-
tificates, amend-
ment to articles.

Before the issuance of the certificate in this act provided, authorizing any public service corporation to issue bonds, notes, or other evidences of indebtedness, for purposes properly chargeable to its capital account, such corporation shall pay the commission a fee of one dollar for each thousand dollars of the face value of the bonds, notes, or other evidences of indebtedness to be issued by virtue of such authority, provided that no fee shall be required when such issue is made for the purpose of guaranteeing, taking over, refunding, discharging, or retiring any bonds, notes, or other evidences of indebtedness. Such fees when collected shall be paid into the common school fund income.

Fee to be paid
for certificate.
Section 1753.—21.

The provisions of this act shall not apply to any stock, bonds, or other evidence of indebtedness heretofore authorized by the commission.

Application,
issues heretofore
authorized by
commission
exempt. Section
1753.—22.

All acts or parts of acts conflicting with any provision of this act, excepting section 1826 and subsection 10 of section 1828, and section 1833, are repealed in so far as they are inconsistent therewith.

Conflicting acts
repealed. Sec-
tion 3.

FORM 1.

Application for Authority to Issue Stock for Money Only.

(Section 1753—9—1.)

IN THE MATTER OF THE APPLICATION OF THE.....
COMPANY FOR AUTHORITY TO ISSUE \$...... OF STOCK
IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 593, LAWS
OF 1911.

To THE RAILROAD COMMISSION OF WISCONSIN.

The petition of the.....
Company respectfully shows:

1. That it is a corporation duly organized and existing under and by virtue of
the laws of the State of Wisconsin, with its principal office in the of
....., and is a public service corporation within the meaning
of Section 1753—1; that it is engaged (organized for the purpose of engaging) in the
business of..... in
..... and is duly authorized by its articles of incor-
poration so to do.

2. That the total authorized capital stock of your petitioner is
..... dollars, divided in shares of
..... dollars each, of which amount.....
dollars has been issued and is now outstanding.

3. That your petitioner desires authority to issue.....
dollars of its authorized capital stock for money only for the purpose of supplying
your petitioner with funds for (itemize purposes with costs).....
.....
that the amount of money to be derived from the sale of said stock is reasonably
necessary for the purposes above set forth.

4. That attached hereto and made a part hereof and marked Exhibit "A" is a
trial balance of your petitioner as of.....; that attached here-
to and made a part hereof and marked Exhibit "B" is a statement of the receipts
and disbursements of your petitioner for the year ending.....

WHEREFORE your petitioner, the.....
..... Company, petitions the Railroad Commission of Wisconsin
for a certificate of authority to issue and dispose of its capital stock to the amount
of dollars.

Dated this day of, 191....
..... Company

(SEAL) By
President,
.....
Secretary.

State of Wisconsin, }
County of..... } ss.

..... and
being first duly sworn, depose and say that they are respectively the President and Secretary of the..... Company, and as such have executed the foregoing statement and affixed thereto the corporate seal of said company; that they have read said statement and the exhibits attached thereto and know the contents thereof, and that the same is true to the best of their knowledge, information and belief.

.....
.....

Subscribed and sworn to before me this day of
....., 191....

.....
Notary Public, Wisconsin.

FORM 2.

Application for Authority to Issue Stock for Property or Services.

(Section 1753—9—4.)

(Title and paragraphs 1 and 2 same as Form 1.)

3. That your petitioner desires authority to issue.....
dollars of its authorized capital stock in exchange for the following property (services) (give description of property or services, or both in detail together with estimated value)
.....
that such property (services) is reasonably worth, for the purposes of your petitioner, the sums designated.

4. That in addition to such property (services) your petitioner will receive for said stock the sum of dollars.

(Insert paragraph similar to paragraph 4 of Form 1, sign and verify.)

FORM 3.

Application for Authority to Issue Bonds for Money Only.

(Section 1753—9—1.)

IN THE MATTER OF THE APPLICATION OF THE.....
COMPANY FOR AUTHORITY TO ISSUE \$.....
OF BONDS IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER
593, LAWS OF 1911.

(Paragraph 1, same as Form 1.)

(Paragraph 2, same as Form 1 and add) that there is issued and outstanding bonds of your petitioner to the amount of.....
dollars, said bonds maturing as follows.....

.....
.....
3. That your petitioner desires authority to issue bonds in the amount of.....
..... dollars, such bonds to be dated.....
and to mature.....,to be of the denomination of.....
.....dollars each, to be numbered to
both numbers inclusive, to bear interest at the rate of per cent per
annum payable semi-annually on the.....days of.....
..... and of each year and to be se-
cured by a mortgage or trust deed issued to

4. Said bonds shall be sold for money only and the proceeds derived from the
sale thereof shall be used for (itemize purposes with costs).....
.....
.....
that the amount to be derived from the sale of said bonds is reasonably necessary
for the above mentioned purposes.

(Insert paragraph similar to paragraph 4, Form 1, sign and verify.)

FORM 4.

Application for Authority to Issue Bonds for Property or Services.

(Section 1753—9—4.)

(Title and paragraphs 1, 2, and 3, same as Form 3.)

4. Said bonds to be exchanged for the following property (services) (give des-
cription of property or services or both in detail, together with estimated value)
.....
.....that such property (services) is
reasonably worth, for the purposes of your petitioner, the sum designated.

5. That in addition to such property (services) your petitioner will receive for
said bonds the sum of.....dollars.

(Insert paragraph similar to paragraph 4, Form 1, sign and verify.)

APPENDIX K.

REPORTS OF DECISIONS OF THE PUBLIC SERVICE COMMISSIONS OF THE FIRST AND SECOND DISTRICTS OF THE STATE OF NEW YORK.

In the Matter of the Application of KINGS COUNTY ELECTRIC LIGHT AND POWER COMPANY for approval of the issue of convertible debenture bonds of the par value of \$5,000,000.

Case No. 1174.

OPINION OF THE COMMISSION.

COMMISSIONER MALTBIE:—This application affects two electrical corporations in the Borough of Brooklyn: The Edison Electric Illuminating Company of Brooklyn, referred to herein as the Edison Company; and the Kings County Electric Light and Power Company, commonly known as the Kings County Company. The former, incorporated in 1887, began operation about two years later, obtained control of a competing company in 1898, absorbed two other competing companies later, and in turn came to be controlled by the Kings County Company. The latter was incorporated in 1890, but operated only on a very limited scale for a short time prior to October 30, 1899, under which date, it leased its property and franchises for a period of thirty-eight years to the Edison Company. At the present moment, the Edison Company is the operating company and the Kings County Company is the financial end of the combination. All of the stock of the Edison Company is owned by the Kings County Company and is pledged under a mortgage as security for the payment of ninety-nine-year, six per cent bonds, par value \$5,176,000, issued in payment for the stock, par value, \$5,000,000. Up to September 30, 1909, the Kings County Company had advanced to the Edison Company nearly \$7,700,000 and had received in return demand notes for most of it, the remainder being represented by open accounts. Neither the demand notes nor the accounts bear interest, as all of the net income from operation is turned over to the Kings County Company under the lease of 1899 which provides that the annual net profits (after deducting operating expenses and interest upon the Edison bonds) shall be used as follows:—

1. To pay coupons and interest on the purchase-money, 6 per cent 99-year bonds of the Kings County Company, amounting to \$5,176,000, due 1997.
2. To pay coupons and interest on the first mortgage, 5 per cent 40-year bonds of the Kings County Company, amounting to \$2,500,000, due 1937.
3. To pay all taxes, assessments, etc., levied against the Kings County property, such payments, however, to be 'deemed to be charges to be deducted by the Edison Company before arriving at net profits.'
4. After the payment in full of the obligations enumerated, the Edison Company is to turn over to the Kings County Company the remainder of such net profits as would otherwise be applicable to dividends on the Edison stock. The Kings County Company guaranteed the first consolidated mortgage, 4 per cent 40-year bonds of the Edison Company, due 1939, of which \$4,275,000 are now outstanding of a total amount of \$10,000,000 authorized.

NATURE OF APPLICATION.

In the original application, the Kings County Company asked for the approval and consent of the Commission to issue six per cent debenture bonds to the amount of \$5,000,000, par value, payable twelve years from the date thereof, and convertible into stock of the Kings County Company at the option of the holder at par at any time between three and twelve years from date.

The money thus obtained was to be used for the following purposes:—

‘To reimburse the treasury of the Kings County Company and the Edison Company to the extent of the amounts appropriated and expended on improvements, extensions and betterments out of reserve and surplus funds, in addition to the capital acquired by the increase of the capital stock of the Kings County Company from \$5,000,000 to \$10,000,000, as shown by Schedules A, B, C, D, E and F, annexed hereto and forming part of this petition.	\$3,539,660 98
‘To provide funds for the necessary improvements, extensions and betterments included in the budget or appropriations for the year 1909, which have not been made or remain uncompleted.. . . .	412,695 31
‘To provide funds, so far as the remainder of the proceeds of said convertible debenture bonds may be sufficient therefor, for the necessary improvements, extensions and betterments included in the budget or appropriations for the year 1910.. . . .	1,047,643 71
‘Total.. . . .	\$5,000,000 00

When the hearings upon this application were begun, it soon became apparent that the application did not give a clear statement of what it was proposed to do. As a matter of fact, the Kings County Company intended to use the money in the following ways:—

To reimburse its funds.. . . .	\$1,212,914 50
To pay for extensions and betterments to its plant, about	950,000 00
Total, about.. . . .	\$2,162,914 50

Whatever amount was not so spent was to be turned over to the Edison Company, which company, it appeared, intended to use the money for the following purposes:—

To reimburse various funds.. . . .	\$1,178,051 75
To retire and pay off bills and accounts payable.. . .	1,014,671 71
To pay for extensions, additions and betterments and to provide cash for the general cash account, about	644,362 04
Total, about.. . . .	\$2,837,085 50

In return for the amount thus advanced, the Edison Company was to give the Kings County Company a demand note or notes bearing no interest.

REVISED APPLICATION.

When the above facts became apparent from the evidence presented, the attention of the applicants was called to the legal question involved, to the statutory provisions which do not authorize the issuance of bonds or stock to reimburse funds and to the

fact that no application had been made for the approval of the demand notes. As the companies were much more anxious to secure funds for extensions and betterments than for reimbursements, the applicants submitted two amended petitions, each petition requesting approval of the issuance of debenture bonds to the amount of \$2,500,000, or \$5,000,000 in all. The submission of evidence relative to reimbursements has not been completed, but at the request of the companies, the other application is passed upon by the Commission. This application states that the money to be secured will be used:—

‘To provide funds for the necessary improvements, extensions and betterments included in the budget or appropriations for the year 1909, which at the date of the original application herein had not been begun or remained uncompleted.. . . .	\$ 412,695 31
‘To provide funds for the necessary improvements, extensions and betterments included in the budget or appropriations or other construction purposes for the year 1910.. . . .	1,866,619 00
‘To provide funds for improvements, extensions and betterments and the acquisition of property, not included in the budgets for the years 1909 and 1910.. . . .	220,685 69
Total.. . . .	\$2,500,000 00

Of this amount, \$1,000,000 from the second item above is to be spent by the Kings County Company upon its own property, and \$1,500,000 loaned to the Edison Company for the purposes above stated, demand notes bearing no specified rate of interest being received in return.

FRANCHISES.

This being the first application for the approval of securities from these two companies, a thorough examination has been made into the financial status of each company. The Edison Company obtained its first franchise November 3, 1888. This franchise authorized the company to construct and operate an underground system and to supply electric current for illumination and power. It covered the then City of Brooklyn—the area within the present Wards 1 to 28—about 40 per cent of the present area of the borough. The company operated under this franchise and this franchise only until 1899, although in 1898 it obtained control, through stock ownership in the Amsterdam Electric Light, Heat and Power Company, of a franchise granted in 1896. The Edison Company does not operate under this franchise but controls it.

Under date of October 30, 1899, the Edison Company absorbed by merger two other companies—the Municipal Electric Light Company and the Citizens Electric Illuminating Company. The latter was operating at the time under a franchise granted May 19, 1884, to Pope, Sewall & Company, which authorized the Company to establish and operate an overhead system for electric lighting, but said nothing about an underground system or the supply of current for other purposes than lighting. Upon the same day in 1884 and in precisely the same form, a franchise was granted to Charles Cooper & Company. This grant was limited to Wards 13 to 19, both inclusive, as they then existed, or present Wards 13 to 19, 27 and 28. The grant to Pope, Sewall & Company covered “the remaining Wards of the City of Brooklyn”—the present Wards 1 to 12 and 20 to 25. As the present Wards 26 and 29, 30, 31 and 32 were not within the area of the City of Brooklyn at the time these grants were made, it is certain that the franchise to Charles Cooper & Company cannot cover them, and it is also true that the franchise to Pope, Sewall & Company cannot include them unless the terms of the franchise are so construed as to apply to areas afterwards annexed.

The Edison Company was unable in the general investigation to furnish any documents proving a transfer of the original franchises from these two companies to the Municipal Electric Light Company and the Citizens Electric Illuminating Company, but the record clearly shows the merger of these two companies with the Edison Company, and they certainly operated independently of the Edison Company prior to the merger, whether or not they had legal title to the franchises.

The Edison Company apparently has a clear title, therefore, to a franchise to supply electricity for illumination and power by an underground system in Wards 1 to 28. Its title to franchises to supply current for electric lighting by an overhead system in Wards 1 to 25, 27 and 28 is not clear but reasonably certain. The ownership of these franchises is important, for they are the only ones specifically authorizing the construction and operation of overhead lines. If the theory that a franchise is extended by annexation is correct, the company has other rights giving it authority to supply current for illumination and power by an underground system in the entire Borough of Brooklyn. Through the Amsterdam Company the Edison also controls another franchise to supply current by an underground system in the entire Borough with the possible exception of Ward 32.

The Kings County Company obtained its first and only franchise upon June 23, 1894, authorizing it to construct and operate an underground system and to supply current for electric lighting, heat and power. The area of the city at the time of the grant included present Wards 1 to 29 and 31. Wards 30 and 32 were annexed shortly thereafter. Through the lease of the Kings County Company's property, the Edison Company obtained control of another franchise for a limited period, but this franchise is for an underground system and does not apply to the city of Brooklyn unless the territory annexed after the grant is considered to have been brought *ipso facto* under the franchise.

KINGS COUNTY COMPANY BALANCE SHEET.

Upon September 30, 1909, the books of the Kings County Company showed assets and liabilities to be as follows:

Assets.

Plant and Property.....	\$ 4,914,959 83
Cash Account.....	1,566 17
Guarantee Fund.....	1,000,000 00
Stocks of Controlled Corporations.....	5,175,870 00
Bills Receivable—Edison Co.....	6,350,000 00
Accounts Receivable—Edison Co.....	1,334,758 60
Interest and Dividends Receivable, Guarantee Fund	17,593 33
Dividends, Special Deposits.....	1,228 00
Unamortized Debt Discount.....	94,166 57
	<hr/>
	\$18,890,142 50

Liabilities.

First Mortgage Bonds, 5% S. A., 1937.....	\$2,500,000 00
Purchase Money Bonds, 6% S. A., 1997.....	5,176,000 00
Dividend Declared.....	1,228 00
Common Stock.....	10,000,000 00
Reserve Account—Premiums on Common Stock..	10,542 00
Corporate Surplus.....	1,202,372 50
	<hr/>
	\$18,890,142 50

Of the capital stock, 81,249 shares were sold for cash at par, and 251 shares were sold for cash at a premium, netting the company about 140. The total cash received was \$8,160,542. Of the remainder, 17,000 shares (par value \$1,700,000) were issued in 1897 and 1898 to certain persons for property and services connected with the construction of the original plant, and 1,500 shares (par value \$150,000) were issued to two persons for services in connection with the negotiation of the purchase of the Edison stock.

The prior lien bonds were disposed of as follows: 1,000 were sold for cash at a discount of 10 per cent; 1,500 were issued to persons as part payment for the original plant. The purchase money bonds were issued to purchase the stock of the Edison Company.

Thus the stock and bonds represent:

Cash paid in..	\$9,060,542
Issued for property and services..	3,200,000
Issued to purchase Edison stock and in connection therewith..	5,326,000
Discounts..	100,000
Total..	<u>\$17,686,542</u>

Two changes should be made in the balance sheet. The stock issued to certain persons when the Edison stock was acquired is not charged to the proper account. It is charged to plant and construction, but should be charged to cost of Edison stock or to surplus account. The company has not amortized as rapidly as it should the bond discount. At the end of 1909, \$30,000 should have been set aside. The deficiency should be made good at once by reducing surplus account. Indeed, the whole amount might well be charged to surplus. To what extent the item of \$4,900,000 is now actually represented by physical property has not been determined.

Another significant fact is that the Kings County Company has no depreciation reserve nor any other reserve except a small amount of \$10,000. The "corporate surplus" must answer for these purposes, and if proper reserve accounts were to be established, the net surplus would be very greatly reduced. Furthermore, the corporate surplus is not represented by cash or marketable securities. It is represented by amounts due from the Edison Company or by charges made to plant and property account or by both. Any unusual demand, therefore, which could not be met out of earnings would have to be met by an increase in liabilities. The corporate surplus account could not perform such a function.

EDISON COMPANY BALANCE SHEET.

The statement of assets and liabilities of the Edison Company, upon September 30, 1909, was as follows:

Assets.

Plant and Property..	\$16,088,135 04
Materials and Supplies..	677,925 52
License under Edison Patents..	945,000 00
Stocks and Bonds of Other Companies..	423,770 00
Coupon Special Deposits..	230,095 50
Morton Trust Co., Trustee (Real Estate Deposits)	4,900 00
Insurance Investment Fund..	159,003 22
Cash Accounts..	20,648 66
Bills Receivable, General and Miscellaneous.. . .	780 96
Bills Receivable, Amsterdam E. L. H. & P. Co..	46,506 70
Accounts Receivable, City of New York.. . . .	122,900 37
Accounts Receivable, Commercial and Miscellaneous..	301,760 04
Accounts Receivable, Amsterdam E.L.H. & P.Co	2,735 12
Other Accounts Receivable—Uncompleted Contract Orders..	15,995 57
Interest and Dividends Receivable—Amsterdam E. L. H. & P. Co..	178,325 00
Prepaid and Suspense Accounts..	25,376 51
Unamortized Debt Discout..	495,362 79
	<hr/>
	\$19,739,221 00

Liabilities.

Capital Stock..	\$ 5,000,000 00
First Consolidated Mortgage 4% Gold Bonds.. . .	4,275,000 00
Unmatured Coupon Interest Accrued..	42,750 00
Coupon Interest Matured..	230,095 50
Bills Payable—General..	500,000 00
Bills Payable, Kings Co. E. L. & P. Co..	6,350,000 00
Accounts Payable—General..	481,750 40
Accounts Payable—Kings Co. E. L. & P. Co.. . . .	1,334,758 60
Consumers' Deposits..	78,738 07
Other Accounts Payable..	32,921 31
Accrued Expenses..	306,176 11
Replacement and Depreciation Reserve..	626,669 56
Insurance Reserve..	178,318 44
Interest Revenues Reserve—Amsterdam E. L. H. & P. Co..	178,325 00
Other Reserves..	123,718 01
	<hr/>
	\$19,739,221 00

All of the stock is reported to have been issued for cash at par except 9,450 shares (par value of \$945,000) which were turned over to the Edison Electric Light Company, a manufacturing company, the predecessor of the General Electric Company. The Edison Company, of Brooklyn thereby obtained the 'exclusive use, both for isolated and central station lighting [and for heat and power other than railways]

* * * within the corporate limits of the said City of Brooklyn' of the patents controlled by the parent company, which agreed to give the licensee company as favorable prices upon its purchases as were offered to other purchasers of like amount in the United States.

The first lot of bonds issued, par value \$2,000,000, was sold at 85, netting \$1,700,000. The second lot, par value \$1,875,000, brought 88, netting \$1,650,000. The total discount on both issues aggregated \$525,000. The remainder, par value \$400,000, with a small amount of cash—about \$5,000—were exchanged for stock of the Amsterdam Company, par value \$487,000, bonds of the same company, par value \$300,000, and coupons amounting to \$525, or a total of \$787,525. The Amsterdam Company is practically defunct. It has never paid its coupons, nor any interest on its bonds nor any dividends on its stock since the Edison Company has owned them. Its property consists of a franchise and certain subways of small value carried upon the books at about \$38,000. The current liabilities upon December 31, 1908, exceeded \$217,000 and the corporate deficit \$978,000.

The proceeds from the sale of the first issue were used to buy the stock of the Municipal Electric Light Company, above referred to. The funds obtained from the second lot were all used to retire at 110 the five per cent bonds that were then outstanding, all of which had originally yielded cash at par.

From the above it follows that the stock and bonds of the Edison Co., par value \$9,275,000, were issued for:—

Cash.. . . .	\$ 7,405,000
Discounts.. . . .	525,000
License rights.. . . .	945,000
Stock and bonds of Amsterdam Co.. . . .	400,000

Of the first amount, \$150,000 went to pay premiums and is not represented by property. Whether the remainder is so represented could only be determined by a complete inventory and appraisal of the plant and property of the company. Without such an appraisal, it is impossible to say whether the other real liabilities of the company are represented by real assets, but the examination which has been made shows that as to the following items some special provision should be made:—

1. Discounts (1898).. . . .	\$ 300,000
2. Discounts (1899 and 1900).. . . .	225,000
3. Premiums paid (1899 and 1900).. . . .	150,000
4. Amsterdam Co. stock and bonds, about.. . . .	405,000
5. Amsterdam Co. Bills, about.. . . .	47,000
Total.. . . .	\$ 1,127,000

The first three items, amounting to \$675,000, have been put into a separate account and up to September 30, 1909, there had been written off \$179,637.21, leaving a balance to be amortized of \$495,362.79. Applying the rule laid down in the system of accounts established by the Commission, this must be written off within the remaining life of the bonds—39 years from January 1, 1910, and the amount already set aside is practically what it should be.

To date no portion of the \$405,000 invested in stock, bonds and coupons of the Amsterdam Company has been written off; but as already pointed out these securities represent practically no property except a franchise and have earned no income for at least twelve years. The Edison Company is not operating under the franchise, and practically its only present value arises through the fact that while the Edison Company controls the Amsterdam Company, no other person or corporation can use the franchise, and competition is thereby prevented from this source. This is an intangible which ought not to be capitalized or continue to be capitalized. If its

capitalization is justifiable, the capitalization of the refusal of the State or the City or this Commission to allow a competing company to come in would be equally justifiable. *In our opinion, this amount of \$405,000 should be written off at once, or at least \$110,000, the remainder being amortized or accumulated in a sinking fund so that this amount of capitalization will be wiped out when the bonds become due.* As the amounts due the Edison Company by the Amsterdam Company are of very doubtful value, it would be an evidence of prudent management to retire them at once. If the sum \$405,000 is not set aside at once to balance the entry upon the asset side of the balance sheet, the amounts due from the Amsterdam Company should be written off at once.

NET EARNINGS OF EDISON COMPANY.

According to the sworn report made to this Commission for the year ending December 31, 1908, the Edison Company paid directly to the bondholders of the Kings County Company interest amounting to \$435,560 and turned over to the Kings County Company \$777,532.65 in cash, or a total of \$1,213,092.65. This amount may be said to represent the rental which the Edison Company paid under the lease for the use of the Kings County Company plant, interest on loans and dividends on the stock of the Edison Company. The first stood upon the books of the Kings County Company at the end of the year at. \$ 4,672,830 08

The money loaned to the Edison Company by the Kings County Co.
upon which no interest as such was paid at the end of the year
amounted to. 7,913,630 38

A total of. \$12,586,460 46

The Edison Co. paid directly to the bondholders of the Kings
County Co. interest at the rate of 5 or 6 per cent upon bonds for 7,676,000 00

Deducting this amount, there is left a sum of. \$ 4,910,460 46

At 6 per cent the interest upon this amount would be. 294,627 63

Deducting this amount from the payment made to the Kings County
Co. of. 777,532 65

There will remain. \$ 482,905 02

This sum is equivalent to a return to the Kings County Company upon the stock of the Edison Company (\$5,000,000 par value) which it owns of 9.66 per cent. In other words, if the Edison Company had paid the Kings County Company 6 per cent for the money borrowed, the stockholders would have received in the year 1908 dividends of 9.66 per cent, all operating charges and interest having been paid. The statement made in the application that the Edison Company has paid no dividends during the past five years is rather misleading therefore. As a matter of fact, no dividends as such have been paid since the lease was made in 1899, but applying the above method to each of the years in question, the net rental has been equivalent to dividends at the following rates:—

1900..	6.26%	1905..	8.37%
1901..	8.32%	1906..	8.56%
1902..	10.97%	1907..	8.94%
1903..	11.64%	1908..	9.66%
1904..	13.54%		

The decrease after 1904 was due largely to the fact that in this year for the first time under the lease there was set aside an amount to write off discounts and for re-

serves of \$150,000. In 1908, this figure reached over \$421,000. If the same practice had been followed after 1905 that was in vogue prior thereto, the percentages would be much larger than the above, viz.: 1905, 11.37 per cent; 1906, 11.56 per cent; 1907, 14.79 per cent; 1908, 18.09 per cent. If the Legislature had not reduced the price charged for current, the net earnings would have been very much larger.

There is another way of looking at it. Assume that the amount paid over to the Kings County Company itself is a return equally for money loaned and for dividends on stock. Then the computation becomes for the year 1908:

Amount after deducting face value of Kings County Company bonds upon which interest is paid.....	\$ 4,910,460 46
Capital stock of Edison Company.....	5,000,000 00
A total of.....	\$ 9,910,460 46

Now the amount paid to the Kings County Company was \$777,532.65, which is equivalent to 7.85 per cent upon the preceding total. Similar figures for the entire period are:

		Including payments to reserve and discount accounts.
1900.....	7.32%	11.04%
1901.....	14.60 "	9.68 "
1902.....	22.47 "	10.47 "
1903.....	14.73 "	12.10 "
1904.....	13.98 "	
1905.....	8.23%	
1906.....	7.70 "	
1907.....	7.49 "	
1908.....	7.85 "	

It thus becomes apparent that if the net earnings of the Edison Company continue in the same relative amount, the stockholders of the Kings County Company will make a considerable profit through the proposed plan of financing the needs of both companies.

INCOME ACCOUNTS.

In condensed form, the income accounts of the two companies for the years since the lease was made in 1899 are as follows:

INCOME ACCOUNT—BROOKLYN EDISON COMPANY.

Items.	1900.	1901.	1902.	1903.	1904.	1905.	1906.	1907.	1908.
Earnings.....	\$ 1,482,591	\$ 1,691,429	\$ 2,013,539	\$ 2,268,052	\$ 2,513,159	\$ 2,551,147	\$ 2,848,822	\$ 3,423,374	\$ 3,564,642
Operating Expenses.....	808,036	879,035	1,045,146	1,173,563	1,232,197	1,351,208	1,505,768	1,770,170	1,747,758
Net Earnings.....	677,555	812,394	968,393	1,094,489	1,280,962	1,199,939	1,343,054	1,653,204	1,816,884
Gross Income*	677,555	803,728	957,270	1,081,884	1,269,387	1,194,432	1,337,136	1,636,979	1,816,884
Interest.....	608,115	606,560	618,772	606,560	608,887	606,560	606,560	606,560	606,560
Discount written off.....	.....	.....	.....	.....	.....	50,000	50,000	50,000	16,935
Reserves.....	.....	.....	.....	.....	.....	100,000	100,000	242,832	404,832
Paid to Kings County Co.....	.....	.....	.....	.....	.....	437,872	580,576	737,487	777,533
Surplus.....	69,440	197,168	338,498	475,324	660,500	.....	.....	.....	10,999

* After deducting bad debts.

† Includes interest on bonds issued by the Kings County Company (par value \$7,676,000) as well as those of the Edison Company (par value \$4,275,000); also such other interest as was paid—small in amount.

INCOME ACCOUNT—KINGS COUNTY ELECTRIC LIGHT AND POWER COMPANY.

Items.	1899.	1900.	1901.	1902.	1903.	1904.	1905.	1906.	1907.	1908.
Interest on guarantee fund.....	\$ 14,926	\$ 39,383	\$ 46,520	\$ 46,520	\$ 46,520	\$ 46,520	\$ 46,520	\$ 46,520	\$ 46,520	\$ 46,520
Income from other sources.....	.....	3,006	1,046	526	435	407	237	1,930	1,846	2,308
Net earnings from Edison Company.....	.....	69,440	197,168	338,498	475,321	660,501	437,872	580,576	737,487	777,533
Total income.....	14,926	111,829	244,734	385,544	522,279	707,428	464,629	629,026	785,853	826,361
Dividends.....	.....	89,100	150,000	150,000	237,364	321,508 (a)	410,000	592,000	764,000	800,000
Net income.....	14,926	22,729	94,734	235,544	284,915	385,920	74,629	37,026	21,853	26,361
Total surplus at end of year.....	14,926 (b)	46,592	141,326	376,870	661,785	1,047,705	1,122,334	1,159,360	1,181,213	1,207,574

(a) Including \$10,000 besides dividends.

(b) Including \$8,937 as a credit to profit and loss.

DIVIDENDS PAID.

The dividends actually declared and paid by the two companies are as follows:—

Year.	Edison Co.	Kings County Company.
1888.....	Franchise obtained in November.....	
1889.....	Operation begun on a small scale.....	
1890.....	About 2 per cent earned, but not divided.....	Incorporated.
1891.....	2 per cent.....	
1892.....	4 ".....	
1893.....	5 ".....	
1894.....	5 $\frac{3}{4}$ ".....	Franchise granted.
1895.....	6 ".....	Not operating.
1896.....	6 ".....	" "
1897.....	6 ".....	" "
1898.....	8 $\frac{1}{2}$ nearly.....	" "
1899.....	*9 $\frac{3}{4}$ per cent in 9 mos.....	" "
1900.....	Earnings paid to Kings Co. Co.....	†4 $\frac{1}{2}$ per cent.
1901.....	" " " ".....	6 "
1902.....	" " " ".....	6 "
1903.....	" " " ".....	7 $\frac{1}{2}$ "
1904.....	" " " ".....	8 "
1905.....	" " " ".....	8 "
1906.....	" " " ".....	8 "
1907.....	" " " ".....	8 "
1908.....	" " " ".....	8 "
1909.....	" " " ".....	8 "

* The Edison Company distributed in 1899 over \$100,000 more than it earned, the surplus account being practically exhausted for this purpose.

† The first year in which the company reports any receipts from operation.

SECURITY OF DEBENTURES.

From the above it appears that *the Kings County Company could pay the interest on the proposed issue of debentures (\$150,000 per annum) and still declare a dividend of over 6.5 per cent*, even if the added expenditures did not increase the net earnings over those for 1908. It is evident also that there would have to be a decrease in the income of the Kings County Company of \$670,000 before the payment of debenture interest would be jeopardized, for the debentures rank before the stock. The possibility that the company will not be able to pay interest, therefore, is remote. It is to be presumed, however, that the expenditure of \$2,500,000 upon additions, extensions and betterments will increase the net earnings. The first few years may not see the full fruition of the investment, but as the debenture holders are guaranteed a return of six per cent for the first three years, they are not likely to suffer.

The option given to the holders of converting the bonds into stock at par is a valuable feature. The Kings County Company has been paying eight per cent dividends for six years. If, at the end of three years, the indications are that a higher rate than six per cent will be paid, the holders doubtless will exercise their option and thus obtain a security paying a higher return than six per cent without the expenditure of a single dollar. Thus, they are assured six per cent and may get seven per cent, eight per cent or even more.

CONTROL OVER EXPENDITURES.

The Commission has made through its engineers a careful examination into the needs of the two companies so far as concerns this application, and there seems to be no question but that they will need for extensions, additions and betterments, pro-

perly chargeable to capital, the amount of \$2,500,000. In previous cases, it has been the practice of the Commission, and it is the practice in other states, to restrict the application of the proceeds from the sale of securities to the purposes stated in detail in the petition. Otherwise, money obtained from stock or bonds may be used to pay operating expenses or for purposes not considered when the order of approval was issued. Yet, it is almost impossible to predict in detail what expenditures will actually be made, for conditions may change and instead of purchasing new boilers a new sub-station may be needed by the time the money is actually available.

The fundamental question, assuming the financial plan is worthy of approval, is whether a specific expenditure should be charged to operation and paid out of current income or charged to capital and paid by the issuance of bonds or stock. This question can most properly be decided when the expenditure is actually made and the bill presented.

Furthermore, if the Commission has a check upon the expenditures actually chargeable to capital in this way, every necessary safeguard against overcapitalization at this point is provided, and the company may be allowed greater leeway. Then, too, if a company fails to spend a certain small sum for the specific purpose stated in its application and made a part of the order, but does spend it for another capital purpose, and such expenditure is approved, no question will arise as to the legality of the act or as to the violation of an order of the Commission.

In view of these facts, the order in this case provides that the companies may issue debenture bonds for \$2,500,000, the proceeds to be used for extensions, additions and betterments to the physical property. No details are stated, but the Commission has reserved the right of passing upon expenditures as made. If any of those submitted are not considered a proper capital charge, they will have to be paid out of current income. The customary clauses as to audit, accounting, etc., are also inserted.

Memorandum.

COMMISSIONER MALTBY:—

In one respect I do not agree with the majority of the Commission. I believe that the market value of these convertible debentures is more than par. It is stated that the prospect that the present stockholders will be given the right to subscribe for debentures at par, has raised the market value of the stock. If this is true, and there seems to be no reason to doubt it, it follows inevitably that the market value of the proposed debentures is more than par. In 1901, when the Kings County Company was comparatively a new company and had not yet paid any dividends at higher rate than six per cent and those not for one whole year, a small issue of stock—251 shares—was sold to the public and not offered to the stockholders at par. It netted the company over \$140 per \$100 share, after paying commissions and expenses. The present debentures in certain respects are even preferable to stock, but they are to be sold at par. If they are worth more than par, why should not the company obtain the highest possible price? Why should the stockholders be given securities at less than the market rate? The rate of dividends paid in the past and the present market value of the stock—about 130—do not indicate that they deserve special considerations and favors.

STATE OF NEW YORK PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT.

In the Matter of JAMES N. WALLACE, and Others, composing the Bondholders' Committee of bonds issued under the First Consolidated Mortgage of Third Avenue Railroad Company, dated May 15, 1900, for approval of the issue of \$15,790,000 First Refunding Mortgage Bonds, \$22,536,000 Adjustment Mortgage Income Bonds, \$16,590,000 Capital Stock by a new company contemplated in the plan of reorganization of said Third Avenue Railroad Company.

Case No. 1181.

OPINION OF THE COMMISSION.

COMMISSIONER MALTBIE:—

This application, which is the second received from the Reorganization Committee of Bondholders under the consolidated 4 per cent mortgage of the Third Avenue Railroad Company, was originally made by the Committee as proposed purchasers at a sale under foreclosure of the mortgage. While evidence was being presented and before the case was closed, the sale took place and the property has been purchased on behalf of the Committee. A new corporation, known as the Third Avenue Railway Company, has been organized to take over the property purchased, and has been allowed to intervene and become a party in this proceeding, and now joins in this application.

It seems necessary, before examining the application, to review briefly the history of the Third Avenue Railroad Company and the properties which are involved in this proceeding.

RÉSUMÉ OF THIRD AVENUE RAILROAD COMPANY.

The Third Avenue Railroad Co. was incorporated October 8, 1853, with capital stock of \$1,170,000, and took over any rights given by a consent of the Common Council of the City of New York December 18, 1852, known as the Van Schaick grant, for a railroad from Broadway and Park Row to the Harlem River by way of Park Row, Chatham Street, Bowery and Third Avenue.

Thereafter, pursuant to the Laws of 1870, Chapter 504, a franchise was sold for a railroad on 125th Street and from 125th Street northerly on Tenth Avenue to its terminus, and a corporation known as the 125th Street Railroad, organized November 26, 1870, with a capital stock of \$150,000, took over this franchise and by lease, bearing date December 10th, 1870, forthwith leased the road to the Third Avenue Railroad Company. These two companies were later merged, a certificate being filed April 23, 1886. The Third Avenue Railroad was originally and for many years a horse railroad. Its capital stock was raised to \$2,000,000 in 1874 and to \$4,000,000 in 1892. Dividends from 1865 to 1900 were paid each year and ranged from 9 per cent in 1865 to as much, in other years up to 1885, as 12, 18, 20 and 25 per cent. The reconstruction of the railroad as a cable road began about 1885 and was completed about 1893. The paid-in capital stock was increased from \$4,000,000 to \$7,000,000 in 1893, to \$8,600,000 in 1895, to \$9,000,000 in 1896, to \$10,000,000 in 1897, to \$12,000,000 in 1899, and to \$15,995,800 in 1900. The dividends from 1885 to 1900 were somewhat less than before, ranging from 7 per cent in 1886 to 12 per cent in 1890 and in 1891, back to 3 per cent in 1893, and up to 8 per cent in 1898 and down to 1½ per cent on \$12,000,000, and 1¼ per cent on \$15,995,800 in 1900. After 1900 no dividends were paid except 5 per cent in 1905 and in 1906, 6 per cent in 1907 and 1½ per cent in 1908.

Between 1895 and 1898 the company also acquired stocks and bonds of other street railroad companies sufficient to control the same, the principal of which companies were the 42d Street, Manhattanville and St. Nicholas Avenue Railway Company, the Dry Dock, East Broadway and Battery Railroad Company and the Union Railway Company of New York City. The money to pay for the securities of these companies was borrowed on short term notes, the securities being pledged as collateral.

In 1898 the work of electrification of the Third Avenue and 42d Street roads was begun, and by the early part of 1900 was so far completed that operation by electricity was begun. The floating debt of the company became, however, so heavy that in February, 1900, the Third Avenue Railroad and the 42d Street Railroad went into the hands of receivers. From an examination made in this case of such books and vouchers as were produced to him, an accountant of the Commission has testified that the debt of the Third Avenue Company in 1900 for stock and bonds purchased, including unpaid interest on notes given therefor, was nearly \$10,000,000; that there were other notes owing by the company to the amount of nearly \$6,000,000, and other floating indebtedness of the company of over \$3,000,000, besides which the subsidiary companies had also floating debts to the amount of over \$2,500,000.

In April, 1900, the Third Avenue Railroad leased its property and transferred its securities in the subsidiary companies to the Metropolitan Street Railway Company, and in May, 1900, executed a 4 per cent consolidated mortgage which was to have priority over such lease and is referred to therein. The stockholders at a special meeting held May 11, 1900, by vote of 126,849 shares out of 159,958 shares, none opposing, voted to adopt and issue this mortgage. The mortgage covered property of the Third Avenue and stocks and bonds of the controlled companies which it had acquired, namely: 20,000 shares being all the capital stock of the Union Railway Company of New York City; 16,711 shares out of the 25,000 shares of the 42d Street, Manhattanville and St. Nicholas Avenue Railway Company; 11,287 shares out of the 12,000 shares of the Dry Dock, East Broadway and Battery Railroad Company; 86 shares, being all of the issued capital stock of the Kingsbridge Railway Company; 357 second-mortgage \$1,000 income bonds of the 42d Street, Manhattanville and St. Nicholas Avenue Railway Company; 9,925 shares out of the 10,000 shares of the Yonkers Railroad Company; 5,000 shares, being all the issue of the Westchester Electric Railroad Company; 2,483 shares out of 2,500 shares of the Southern Boulevard Railroad Company; 12,000 shares, being all of the issue of the Tarrytown, White Plains and Mamaroneck Railway Company. The mortgage made provision for payment out of the proceeds of these bonds, secured by its mortgage, of the floating debt of the Third Avenue and its subsidiary companies, the expenses of the readjustment of the company's affairs, and for the application of the balance of the proceeds derived from these bonds to improvements in, additions to or extensions of the property of the Third Avenue Railroad or its controlled companies. Certain bonds were also reserved to refund underlying bonds of the companies mentioned. Bonds to the amount of \$35,000,000 were forthwith sold, the receiver was discharged and the Metropolitan Street Railway Company took possession of the Third Avenue property and the equity in these securities. Later the receiver of the 42d Street Company was also discharged and operation of that road by that company resumed.

After that time the Metropolitan Company selected the officers and directors and kept the books for all companies so leased or controlled until in 1904 it leased all its owned and leased roads, including the Third Avenue, to the Interurban, later known as the New York City Railway Company, which continued to operate the Third Avenue and to hold the equity in the securities of the controlled companies, subject to the mortgage, and to control the elections and keep the books of all these companies.

PRESENT RECEIVERSHIPS.

In September, 1907, receivers were appointed for the New York City Railway Company by the United States Circuit Court. This appointment was followed a few days later by the appointment of the same individuals, by the same court, as receivers of the Metropolitan Street Railway Company. These receivers continued the operation of the roads, including the Third Avenue, as one system until in January, 1908, when the Third Avenue properties were severed from the system and a separate receiver for the Third Avenue was appointed by the same court. Receivers were also appointed for some of the subsidiary companies whose stock was pledged under the Third Avenue mortgage, the receiver of the Third Avenue Company being appointed by the United States Circuit Court receiver of the Union, 42d Street and Dry Dock companies, and separate receivers being appointed in the New York Supreme Court for the Westchester, Yonkers and Tarrytown companies. Kingsbridge continued to be operated by the Third Avenue receiver, and Bronx Traction by the Union receiver. The Southern Boulevard is a separate operating company.

The action in which the receiver was appointed of the Third Avenue Railroad Company was an action to foreclose the Third Avenue consolidated mortgage and to sell property and securities held thereunder. A decree of foreclosure in this action was entered and filed May 17, 1909. Bonds to amount of \$37,560,000 were issued under this mortgage. In June, 1909, a reorganization committee of holders of these bonds as intending purchasers, and representing \$34,000,000 of the issue, prepared a plan providing for the organization of a new company, and applied to the Commission for authority to such company to issue \$68,516,800 in securities, which application was denied with an opinion.

PRESENT APPLICATION.

The Bondholders' Committee thereupon in December, 1909, made the present application for the approval of another plan and agreement for reorganization and for the issue of securities thereunder. The outstanding securities of the old company are as follows:

First Mortgage.. . . .	\$5,000,000
Consolidated Mortgage.. . . .	37,560,000
Stock.. . . .	16,000,000
Total.. . . .	<hr/> \$58,560,000

Under the proposed plan the first mortgage of \$5,000,000 is to be continued and the securities desired are to be issued in the following amounts:

I. First refunding 50-year, 4 per cent gold bonds redeemable at 105 and accrued interest on or after January 1, 1915.. . . .	\$15,790,000
II. Adjustment mortgage, 50-year 5 per cent income gold bonds, cumulative after three years with voting powers until full interest with accumulations is paid for 5 consecutive years. Redeemable at par and interest on 3 mos. notice.. . . .	22,536,000
III. Stock.. . . .	16,590,000
Total.. . . .	<hr/> \$54,916,000

Adding the first mortgage of \$5,000,000 makes a total of \$59,916,000.

The securities of the new company are to be distributed as follows:

- \$9,390,000 of refunding bonds to holders of the present consolidated bonds, being 15 per cent (\$5,634,000) of the principal and for defaulted interest for 2½ years 10 per cent (\$3,756,000) of the principal.
 6,400,000 of refunding bonds to present stockholders on payment of the assessment referred to below.

\$15,790,000 in all.

- \$22,536,000 of adjustment income bonds to holders of the present consolidated bonds, being 60 per cent of the principal.
 9,390,000 in stock to holders of the present consolidated bonds, being 25 per cent of the principal.
 7,200,000 in stock to present stockholders upon the payment of an assessment of \$45 per share.
-

\$16,590,000 in all.

Thus the holders of the present consolidated bonds are to receive: \$5,634,000 in refunding bonds (15 per cent. of the principal), \$22,536,000 in adjustment income bonds (60 per cent of principal), \$9,390,000 in stock (25 per cent of principal), \$3,756,000 in refunding bonds (10 per cent of principal for unpaid interest), \$41,316,000 in all.

This amount is made up of consolidated bonds, face value, \$37,560,000, and interest thereon, \$3,756,000.

The present stockholders owing stock to the amount of \$16,000,000, par value, are to surrender their stock, pay an assessment in cash of \$45 per share \$7,200,000 in all), and receive in exchange: \$6,400,000 in refunding bonds (equivalent to \$40 per share of old stock), \$7,200,000 in new common stock (equivalent to \$45 per share of old stock), \$13,600,000 in all.

The cash to be paid by the present stockholders was to be used for the following purposes, according to the original petition:

Payment of Receivers' certificates.. . . .	\$2,500,000
Franchise taxes.. . . .	1,500,000
Renewal of tracks.. . . .	1,000,000
Reorganization expenses.. . . .	1,190,000
"Other Companies".. . . .	1,010,000
Total.. . . .	<hr/> \$7,200,000

The mortgage under which the first refunding mortgage bonds are to be issued provides for a total ultimate issue of \$40,000,000 of bonds, of which \$24,210,000 are not to be issued at this time. They are to be reserved to take up the underlying issues of the Third Avenue and its subsidiary companies and to provide for future extensions, betterments and improvements. Under the present law, these bonds cannot be issued without the approval of the Public Service Commission.

PROPERTY PURCHASED BY APPLICANTS.

The property sold under foreclosure of the mortgage, and against which the new securities are desired to be issued, is the property and franchises of the Third Avenue Railroad Company described in the mortgage or thereafter acquired, consisting of its

lines of railroads, lands, buildings, rights, equipment, etc., together with stocks and notes of other companies, as follows:

Union Railway Company of New York City..	20,000	shares.
42d St., Manhattanville & St. Nicholas Avenue Railway Company	16,711	"
42d St., Manhattanville & St. Nicholas Avenue Railway Company	1,460	second mortgage income bonds.
Dry Dock, East Broadway and Battery Rail- road Company	11,287	shares.
Kingsbridge Railway Company.....	86	"
Yonkers Railroad Company.....	9,925	"
Westchester Electric Railroad Company.....	5,000	"
Southern Boulevard Railroad Company.....	2,483	"
Tarrytown, White Plains and Mamaroneck Ry. Co.	12,000	"

Notes of the following companies, for the following amounts each, dated April 30, 1907, bearing interest at 4 per cent from that date:

Dry Dock, East Broadway and Battery Railroad Co..	\$ 1,822,963	70
42d Street, Manhattanville and St. Nicholas Avenue Railway Company	6,491,967	44
Kingsbridge Railway Company.....	2,248,792	70
Union Railway Company of New York City.....	4,715,064	39
Southern Boulevard Railroad Company.....	72,350	73
Westchester Electric Railroad Company.....	1,307,221	82
Tarrytown, White Plains and Mamaroneck Ry. Co...	332,865	34
The Yonkers Railroad Company.....	1,107,867	13
	<hr/>	
	\$18,099,093	25

UNDERLYING SECURITIES.

These stocks are subject to underlying funded liabilities as follows:

Union Railway Company first mortgage bonds 5 per cent.....	\$2,000,000	00
42d St., Manhattanville & St. Nicholas Ave. Ry. Co. first mortgage bonds 6 per cent. \$1,200,000		
Second mortgage bonds 6 per cent as earned..	\$1,600,000	
Held by Trustee or in treasury.....	1,460,000	
Outstanding.....	140,000	
	<hr/>	
		1,340,000 00
Dry Dock, East Broadway & Battery R. R. Co. general mortgage 5 per cent.....	\$ 950,000	
Certificates of indebtedness.....	1,100,000	
	<hr/>	
		2,050,000 00
Southern Boulevard R.R. Co. first mortgage 5 per cent.	250,000	00
Westchester, first mortgage 5 per cent.....	500,000	00
Yonkers, first mortgage 5 per cent.....	1,000,000	00
Tarrytown, White Plains and Mamaroneck, first mor- tage 5 per cent.....	300,000	00
	<hr/>	
		\$7,440,000 00

While the application has been pending, the property covered by the mortgage has been purchased under foreclosure by a Committee of the Bondholders, for \$26,000,000, and a deed has been given, confirmed by the court, pursuant to which the property is conveyed to the purchasers, subject to the \$5,000,000 first mortgage and to all valid taxes and assessments, and subject also to liens, conditions, covenants, etc., as set forth in the decrees in the foreclosure action. After receipt of such deeds, a proposed contract appears to have been entered into for the conveyance by the purchasers on foreclosure to a new company, incorporated and known as the Third Avenue Railway Company, of the purchasers' right, title and interest in the property, subject to all liens, conditions, etc., contained in the foreclosure decree, the decree of confirmation and the deed, except in so far as such liens, conditions, etc., shall have been discharged, etc., at the time of the conveyance under the contract, or may be provided for or discharged *out of the stock and bonds* of the Third Avenue Railway Company which are to be issued, or out of the proceeds thereof. Thereafter, the Third Avenue Railway Company having been organized and having received this contract of purchase, applied in this proceeding to be allowed to intervene as a party therein, and this application having been allowed, the railway company, by its counsel, may now be deemed to be the applying party, asking the Commission for authority, under the statute, to issue the securities above mentioned.

It is to be noted that the applicants do not now request approval of an issue of securities for acquisition of property of a *certain* value, but for the acquisition of property which it is proposed to convey to the new company subject to liens, provisos, conditions and reservations, specified in the decrees of courts and in the deed of uncertain amounts and values. It is the apparent purpose, as indicated above in describing the contract for the acquisition of the property, that the purchasers shall obtain possession of the securities after the action of the Commission and use those securities, in accordance with this organization plan, in part to pay off obligations, etc.

LEGAL QUESTIONS INVOLVED.

In the brief submitted by the applicants, there seem to be three propositions upon which they base their application as matter of law:

(1) The applicants rely upon the reorganization statute, Stock Corporation Law, Sections 9 and 10, as entitling them to issue the proposed securities.

(2) If Section 55 of the Public Service Commissions Law has established actual present value as the sole rule and standard of capitalization on a reorganization, the applicants assert that it would operate necessarily to repeal the reorganization statute and that there has been no such repeal.

(3) It is fairly well settled, they maintain, as a general rule of law applicable to reorganizations that the reorganized company may issue securities at par for the old securities, although the property may not have an actual present value equal to par, and that such issues are not fictitious, or watered or fraudulent issues of stock or bonds.

Citing, *Memphis Co. v. Dow*, 120 U. S., 287, 298, 299.

It is true that provisions authorizing reorganization of failing corporations have been contained in the statutes of the State of New York, as well as of other States, for many years. The history of the provisions in New York down to the year 1884 is stated as briefly as can be in the case of *Vatable v. New York, Lake Erie and Western R. R. Co.*, 96 N. Y., 49, by Judge Earl, of the Court of Appeals.

It is to be noticed, however, that these provisions respecting reorganization of failing corporations had, in the beginning, application only to railroad corporations, and that by the Laws of 1890, Chapter 564, and Laws of 1892, Chapter 688, the provisions were transferred to the Stock Corporation Law and became applicable to the sale of property and franchises of any domestic stock corporation except a moneyed

corporation, and this has continued to be the law of the State until the present time, except in so far as the effect of the provisions is modified by the Public Service Commissions Law, Chapter 429 of the Laws of 1907, which, by Section 87, repealed all acts and parts of acts in conflict therewith.

The courts have decided that the corporations formed under the provisions of the New York statute, authorizing reorganization of such corporations, are new corporations and are not continuations of the old corporations.

People ex rel. Schurz v. Cook, 110 N. Y., 443, 148 U. S., 397;
Minor v. Erie Railroad Company, 171 N. Y., 566.

It is to be noted also that in one of the sections providing for reorganization of stock corporations (Section 10) are found these words:

"Such plan or agreement must not be inconsistent with the laws of the State."

It was said in the case of *Memphis, etc., Railroad Co. v. Commissioners*, 112 U. S., 609, 621, as follows:

"In many, if not in most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law and not of contract, and are, therefore, subject to modification or repeal. Such, in our opinion, would be the character of the right in the mortgage bondholders or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter of law and not of contract. At least, it would be construed as conferring only a right to organize as a corporation according to such laws as might be in force at the time when the actual organization should take place, and subject to such limitations as they might impose. It cannot, we think, be admitted that a statutory provision for becoming a corporation *in futuro* can become a contract, in that sense of the clause of the Constitution of the United States which prohibits State legislation impairing its obligation, until it has become vested as a right by an actual organization under it; and then it takes effect, as of that date and subject to such laws as may then be in force. Such a contract, so far as it seems to assume that form, is a provision merely that, at the time, or on the happening of the event specified, the parties designated may become a corporation according to the laws that may then be actually in force. The stipulation, whatever be its form, must be construed as subject and subordinate to the paramount policy of the State, and to the sovereign prerogative of deciding in the meantime what shall constitute the essential characteristics of corporate existence. The State does not part with the franchise until it passes to the organized corporation; and, when it is thus imparted, it must be what the government is then authorized to grant and does actually confer."

It becomes necessary, therefore, for the purpose of this application to refer to other provisions of the statutes as follows, namely:

"No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable

to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive;" * * *

Stock Corporation Law, Sec. 55.

The Public Service Commissions Law, Chapter 429 of the Laws of 1907, as amended, revised and made part of the Consolidated Laws by Chapter 480 of the Laws of 1910, reads in Section 55 as follows:

"A common carrier, railroad corporation or street railroad corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the State of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations, * * * provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof and stating the purposes to which the issue or proceeds thereof are to be applied, and that in the opinion of the commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been reasonably required for the purposes specified in the order, and that, except as otherwise directed in the order in the case of bonds, notes and other evidence of indebtedness, such purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income. * * * For the purpose of enabling it to determine whether it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. Such corporation shall not, without the consent of the commission, apply such issue or any proceeds thereof to any purpose not specified in such order. * * * The commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof as the consideration for the grant of such franchise or right. * * *"

There is also an amendment in the revision of 1910 of Section 54 as to acquisition and holding of stock in which reference is made to the reorganization statute as to surrender or exchange of stock pursuant to a reorganization plan. This sentence reads as follows:

"* * * Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent upon the surrender or exchange of such stock, pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged."

After considering the contentions of the counsel for the applicants and the authorities, the Commission believes that Sections 9 and 10 of the Consolidated Stock Corporation Law are to be deemed in force, subject in case of conflict to the provisions of the Public Service Commissions Law. The enactment in 1907 of the Public Service Commissions Law providing for supervision and regulation of

railroads and street railroads, gas corporations and electric corporations as to their operations and capitalizations must be deemed to limit, modify and supplement any provisions of the Stock Corporation Law, in so far as the same have application to reorganization of such public service corporations. The re-enactment of the Stock Corporation Law provisions in the Consolidated Laws of 1909 has not operated in any respect to change this conclusion. The provisions are merely continuations of the existing law without new force.

General Construction Law, Section 95.

Laws of 1909, Chapter 27, Chapter 596.

It being distinctly provided by the provisions of the Stock Corporation Law, Section 10, that the plan or agreement for reorganization must not be inconsistent with the laws of the State; any plan or agreement for reorganization in the case of such public service corporations must conform to the provisions of the Public Service Commissions Law. Under the provisions of Section 55, when the Commission makes the order therein mentioned authorizing the issue and the amount thereof, it is not limited to a clerical checking of the property to be acquired, but must determine whether the issue is reasonably required and is in respect of its amount such as ought to be allowed, and whether the purposes of the issue are in whole or in part reasonably chargeable to operating expenses or to income. In making this determination after inquiry or the holding of the hearings directed by the section, the Commission is to follow the standard of equivalents fixed by the Stock Corporation Law and the Public Service Commissions Law.

Authorities may be cited as deciding that such statutory provisions as this have no application to securities issued upon reorganization, but they are cases arising after an issue has been made and the transaction completed. Complainants in these cases were beneficiaries or otherwise estopped from questioning the transaction, and in some of the cases it is intimated by the court that if the State or a creditor questioned the validity of the issue, a different question might be presented. It is to be noted that the present application is *made to the State authorities* for the consent and approval of such State authorities to the issue. Such cases are of no weight in construing the statutes which control this application, and the Commission may approve an issue of stock or bonds of the new corporation only in such new amount as shall be equivalent to the money or property to be acquired by it and for which the issue is to be made.

In making the order or determination, the Commission is not exercising ministerial powers, but administrative powers, delegated to it to be exercised in pursuance of a standard provided by law, and with respect to which it is to ascertain and determine the facts. Upon this point the Commission said in its opinion upon the first application: "The Public Service Commission is an administrative body, authorized in this instance to approve or disapprove the issuance of securities, subject to certain statutory provisions. It is not believed that the Legislature contemplated that action upon stock and bond issues should be perfunctory, or superficial, or even ministerial; but that a careful investigation should be made in every instance, that the interests of the investing public should be protected and that the corporation itself should be prevented from having recourse to those financial methods that have brought public service corporations into disrepute."

BASES OF APPLICANTS' CASE.

The applicants do not rest their case solely upon their interpretation of the law. They argue that their proposal may be justified upon other grounds, which are summarized in their brief as follows:

'(1) That all the existing stock and bonds were indisputably issued in due conformity with the law and for full value furnished by *bona fide* investors;

(2) that there has been no reasonable or adequate return upon the actual cash investment, for during the last ten years the stock has received an average of less than 2 per cent and the bonds an average of less than 3 per cent, whilst the public has all along been using the property; (3) that there has been expended upon the corporate property and assets an amount substantially in excess of the proposed capitalization, and (4) that the estimated cost of reproduction bears a fair and reasonable relation to the securities which will be outstanding in the hands of the public.'

Elsewhere, after citing various figures, they continue:

'These figures establish (1) that the actual cash investment in the Third Avenue enterprise by the bondholders and stockholders substantially exceeds the amount of the proposed new securities, (2) that an amount in excess of such new securities has been actually spent on the property and in the purchase of securities and claims, (3) that the cost of reproduction of the Third Avenue and the actual cost of the stock, bonds and securities of the controlled or subsidiary companies exceed in the aggregate the proposed capitalization, and (4) that the estimated cost of reproduction of the whole system would equal fully 90 per cent of the par or face of the securities which will be outstanding when the reorganization is effected.'

These statements clearly indicate that the applicants believe the petition should be granted for the following reasons:—

(1) Because the stock and bonds of the former Third Avenue Railroad Co. were issued according to law and for the full value to *bona fide* investors;

(2) Because the former company has expended upon the corporate property and assets an amount in excess of the proposed capitalization;

(3) Because the estimated cost of reproduction of the whole system would fully equal 90 per cent of the par or face value of the securities it is proposed to issue;

(4) Because the security holders during the past few years have not received an adequate return upon their actual cash investment.

I.

There seems to be no question but that the stocks and bonds of the old company were lawfully issued. It may be admitted for the sake of argument, although not decided, that the bonds were sold for their full value and that the stock was paid for at par. But does it follow that the holders of the bonds of the defunct company are, therefore, entitled forever to bonds in any successor company having a par value or having interest equal to the old bonds? Does it follow that the stockholders of the defunct company are entitled forever, no matter what has occurred, to stock in the successor company having a par value equal to the old stock? There is no legal basis for such a right, for when the property of a bankrupt company is sold to a new company—as has been done in the case at hand—the security holders have been deprived of their property and their rights are limited to the proceeds of such sale. Neither is there any moral basis for such theory, for the stockholder starts with the distinct understanding that if the company is mismanaged by his representatives or if the results are not as expected, he may lose his investment and his property pass to other persons. Similarly the bondholder understands that he may not recover his investment, and even at foreclosure he may be outbid by an outsider.

But the theory presented by the applicants is not that stock and bondholders of a defunct company have any rights, legal or moral, to equal shares in the securities of the new company (indeed, the plan before the Commission does not give them such shares), but rather that the purchasers of the property at foreclosure sale have a right

to capitalize the new company, regardless of the value or cost of the property, at an amount equal to the *par value* of the securities foreclosed, because the persons who held them paid par or full value. This theory is even more untenable. Upon what possible ground can it be said that the purchasers at foreclosure sale may issue a certain amount of securities in a new company because certain persons paid a certain sum for a certain amount of securities in another company?

A necessary corollary of this theory is that capitalization need have no relation to value. If once a company is started and its securities carefully issued to *bona fide* investors for their full value, an equity would be created which would give any successor company purchasing the property at foreclosure a perpetual right to issue stocks and bonds to the same amount regardless of what happens to the property. The original company might allow the property to decay, it might declare dividends out of capital, it might abuse every corporate privilege and lose 90 per cent of the original investment, and yet the purchasers could reasonably insist that this Commission should approve the issuance of securities equal in amount to the stock and bonds issued by the original company. It violates the sound principle that capitalization should have some direct relation to the value of the property it represents. Whether the purchasers—the new company—might not wisely give the stockholders of the old company a share in the profits, is a question to which we will return later.

The fact that the Railroad Commission approved the issuance of the bonds now being refunded does not alter the situation. It merely indicates at the most that the securities were properly issued, but no such certificate did or could guarantee the holders that they would perpetually have property to the full value of their investment. The money might be squandered by those in control or the company might be mismanaged and the property lost. The approval of the issues by a State board is no guaranty against such things and if they occur the security holders must suffer. Because approval was granted at the beginning is no reason why approval of the same amount of securities must be given to another company which is the successor to the mismanaged company.

II.

In the light of the evidence presented, the second reason above given suggests two questions: (1) Did the former company spend an amount upon the corporate property and assets in excess of the proposed capitalization? (2) Would such a fact justify approval by this Commission of the proposed issues by the successor company?

WAS CAPITAL SPENT ON PROPERTY?

The capitalization of the new company is to be \$59,916,000, not including the current liabilities which must be assumed. The former company had bonds (\$42,560,000) and stock (\$16,000,000)—total, \$58,560,000. The bonds and stock were all issued, except \$4,200 par value of stock. No evidence whatever has been presented to show what became of the money obtained from the sale of stock. Of course, it is included in the 'book' cost of the property, but this is no proof that \$16,000,000 were actually spent upon property or assets. No evidence was presented to show that the proceeds of the first mortgage bonds—face value, \$5,000,000—actually went into the property, except the 'book' entries. But there is considerable evidence as to the disposition of the funds obtained from the sale of the consolidated bonds—face value, \$37,560,000.

Early in the proceedings, a member of the Bondholders' Committee testified that some \$23,000,000 of advances and claims had been liquidated and that some \$13,000,000 or \$14,000,000 had been expended on subsidiary companies. Certain other testimony, consisting of statements made by officers of the old company, was presented by the applicants. In the opinion rendered on the former application, the evidence of Mr.

Whitridge, the receiver appointed by the Federal Court, was quoted in substance as follows:

‘By Mr. Perkins:

‘Q. At the time the Third Avenue Railroad Company was reorganized, if I recollect aright, the amount that it owed was about \$20,000,000 or \$21,000,000, and a plan was then suggested and put through whereby \$37,500,000 of this present issue of bonds which are now threatening to foreclose was put ahead of the stock. I would like to know if you can make any statement as to what became of the difference between the amount, which was about \$21,000,000 or less than \$21,000,000, which the company owed at that time, and the amount of the bonds issued of \$37,500,000? A. I cannot.

‘Q. You do not know what has become of it? A. I do not know what has become of it.

‘Mr. Perkins: That is all.

‘The Witness: I said I would find out, if somebody gave me \$200,000 or \$300,000 to spend on lawyers, but I did not think it was likely to be a profitable inquiry. * * *

‘By Chairman Willcox:

‘Q. In your report to the Committee you said there was no evidence that that amount had been spent on the road? A. *I said in my judgment there was no evidence on the earth, under the earth or over the earth that that amount had been spent on the road.* * * *

At the hearings on the present application, Mr. Whitridge modified this statement somewhat by saying that he had seen evidence of the expenditure of \$23,000,000 or thereabouts.

In the answer made by the Third Avenue Company to the amended and supplemental bill of complaint in the suit brought by the Central Trust Company against the Third Avenue Company and others in the United States Circuit Court, the following statement appears, signed by Mr. John M. Perry, Secretary of the Third Avenue Railroad Company, and Mr. Edward M. Shepard, solicitor and of counsel for defendant, sworn to upon the 24th day of July, 1908:—

‘XVI. And this defendant further answering alleges that at or about the time of the making of the said indenture of lease between this defendant and the Metropolitan Street Railway Company and in or about the month of April, 1900, and thereafter and until in or about the month of April, 1908, and after the filing of complainant's said amended and supplemental bill of complaint in this Court, the Metropolitan Street Railway Company had and exercised practically complete control of this defendant and of its property and assets, and the directors and officers of this defendant were named and in all matters controlled by the said Metropolitan Street Railway Company, and that during that time this defendant, although its corporate character was maintained, had no independent life apart from the control of itself and its affairs and property by the Metropolitan Street Railway Company. Therefore, it is that this defendant is now ignorant in large part of the procedure had or things done during such period in the name of this defendant. *This defendant is informed and believes and charges that by the sale of bonds issued under the seal and in the name of this defendant and purporting to be secured by the said indenture of the 15th day of May, 1900, large sums of money were raised by the Metropolitan Street Railway Company which were not expended upon property of this defendant or in any business or concern of this defendant, but were wrongfully expended by said Metropolitan Street Railway Company for its separate purposes. This defendant avers upon its information and belief that such bonds were to a large extent received by persons knowing that, by the procurement of the Metropolitan Street Railway Company or otherwise, the defendant*

was neither directly nor indirectly to receive the proceeds thereof or any benefit thereof, but that such bonds were disposed of and the proceeds received and applied in violation of the duty owing by the Metropolitan Street Railway Company to this defendant under the said indenture of lease.'

INVESTIGATION OF BOND ISSUE.

In view of these statements, the Commission directed Mr. Marvyn Scudder, an expert accountant employed by the Commission, to examine the books, accounts, vouchers and records of the company to ascertain how the proceeds of the bond sale were used. When this examination was completed, Mr. Scudder was placed upon the witness stand and the results of his investigation made a part of the record. He was cross-examined at length by counsel for the applicants, who presented further testimony through their own accountant. Other witnesses were also questioned. The essential facts may be summarized briefly.

Of the total issue of first Consolidated mortgage bonds, all were sold for cash except 1,003, which were issued in payment, in part or in whole, for 1,003, second mortgage bonds of the 42d Street, Manhattanville & St. Nicholas Avenue Railway Company. The bonds sold had a face value of \$36,557,000 and netted the company \$35,950,174.44. To this amount there should be added certain receipts, being interest allowed by the Trust Company on deposits, \$164,496.20, and sundry items, amounting to \$320,302.14. Deducting the balance on hand June 30, 1907, there remains to be accounted for the sum of \$36,434,961.73. Approximately \$23,000,000 was spent through the Morton Trust Company as trustee and about \$13,000,000 by the Metropolitan Street Railway Company, lessee, under the lease of the Third Avenue Company. Table I shows the expenditures grouped into general divisions.

TABLE I.

PAYMENTS FROM PROCEEDS OF CONSOLIDATED BOND ISSUE.

(1) Stocks and bonds of subsidiary companies purchased.. . . .	\$ 9,053,841 21
(2) Interest on notes given to purchase the above and a few sundry charges.. . . .	897,406 15
(3) Notes and bills payable.. . . .	5,903,666 93
(4) Interest, fees, stamps and commissions on the preceding item.. . . .	599,075 00
(5) Transferred to pay first coupon on bonds.. . . .	240,000 00
(6) Third Ave. floating indebtedness liquidated.. . . .	3,434,844 31
(7) Floating indebtedness of controlled companies purchased.. . . .	2,791,293 08
(8) Mortgage purchased.. . . .	100,000 00
(9) Payments to or for controlled companies.. . . .	5,218,885 77
(10) 'Construction and equipment'.. . . .	7,140,437 45
(11) Reorganization (1900) and legal expenses.. . . .	351,231 26
(12) Miscellaneous items.. . . .	704,280 57
Total.. . . .	\$36,434,961 73

Certain of these items may be further analyzed. The stocks and bonds purchased, as shown in Table II, have a par value of \$5,465,400. Including the interest on the notes which were issued to purchase these stocks and bonds, which interest was paid out of bond moneys, these stocks and bonds stand upon the books of the Third Avenue Company at a cost of \$9,951,247.36—or nearly twice the par value of the securities.

One of the companies is in the hands of a receiver, and by sale under foreclosure decree the stock will be entirely wiped out, and there will be a shrinking in the book assets of approximately \$2,000,000 for this company alone. In other words, stocks which have cost the Third Avenue Company \$2,000,000 and have been paid for out of bond moneys will become worthless, and control of the subsidiary company will be kept, if at all, only through the prior liens that the Third Avenue Company has against the property of the subsidiary company. In another instance the stock is admitted to be worthless, and in still other cases the present earnings are not such as to warrant a payment of par, to say nothing of the premium of 100 per cent and more.

TABLE II.

PURCHASE PRICE OF STOCKS AND BONDS OF SUBSIDIARY COMPANIES.

Company.	Par value.	Total cost paid from Bond Money.
	\$	\$ cts.
Stocks—		
Union Railway Co.....	2,000,000	4,884,554 07
Dry Dock E- B. & Bat. R. R. Co.....	1,128,700	2,560,475 25
42d St., Man. & St. Nich. Av. Ry. Co.....	1,671,100	1,966,468 04
Kingsbridge Railway Co....	8,600	8,600 00
Tarrytown, W. P. & M. Ry. Co.....	300,000	225,000 00
Bonds—		
42d St., Man. & St. Nich. Av. Ry. Co	357,000	306,150 00
Total.....	5,465,400	9,951,247 36

As to items (3) and (4), the record does not show the original purpose for which the money was spent. Certain notes and bills, amounting to nearly \$6,000,000, were paid out of the proceeds of this bond issue. Whether the money obtained by the issuance of these notes originally went into physical property or was used in some other direction not a capital purpose is not shown by the testimony, and Mr. Scudder could not ascertain from the records at his disposal.

Item (5) represents expenditures which should have been charged to earnings and not to capital.

Item (6) includes payments for taxes and assessments, lawyers' fees and interest, but the major portion of the item went for wages and materials.

Item (7) is similar in character to item (4). Three-fourths of the amount is represented by notes, loans and accounts payable, for which the original purposes are not given. Interest, taxes, legal services and operating expenses constitute a considerable portion. Possibly 15 per cent of the total amount may have been for physical property.

Item (9) consists principally of advances to subsidiary companies, but also includes operating expenses, repairs, interest, rents and legal services.

Item (10) consists principally of expenditures for cars, machinery, materials and labor, although there are items which apparently should have been charged as operating expenses.

Over one-half of item (12) consists of legal expenses and transfers to operating cash.

EXPENDITURE CLASSIFIED.

Mr. Scudder undertook to classify the expenditures represented by items (9), (10), (12) and part of (6)—the amount disbursed by the Metropolitan Street Railway Company as lessee. The result was:

1. Construction and equipment.	\$7,808,330 35
2. Doubtful (including advances).	4,403,127 54
3. Operating charges, sundry liabilities, etc.	1,054,106 58

Total.	\$12,265,564 47
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In explanation of this classification, of the method by which he reached the result and of the meaning of each rubric, Mr. Scudder stated that he placed in 'Construction and equipment' all items which, from the information on the voucher, appeared to be of that character and for a capital purpose. Under the heading of 'Doubtful (including advances)', he grouped all amounts as to which the vouchers did not indicate clearly the purpose of the expenditures. Advances to subsidiary companies, from which capital and operating expenses were paid, constitute most of the total. The third division includes many items ranging from operating charges and repairs, to mortgages.

In the light of the evidence adduced by the applicants and the documents they produced which had not been presented to Mr. Scudder, it seems likely that the figures of Mr. Scudder understate the amount actually expended upon the property of the company. It is impossible, however, from the record as it now stands, to say what sum should be considered as actually representing capital expenditures. The records themselves are very incomplete and unsatisfactory. The engineer who certified many of the expenditures for 'construction' was called to the witness stand by a stockholder opposing the application. His evidence throws much light upon the whole question. A few extracts follow:

'By Mr. Littlefield:

'Q. You think this voucher then is probably erroneous in its description?

A. I think there is other work included, aside from the repaving.

'Q. Then your statement amounts to this, that here is a voucher as the basis for the expenditure of \$149,506 that does not truthfully state on its face what it is for, that is what it comes to? A. I think you are right about it. * * *

'Q. You do not undertake to state here on oath that these vouchers truthfully state all the purposes for which this money is expended? A. Certainly not.

'Q. You do not undertake to state any of them do? A. I should not undertake to state what proportion of them have errors. * * *

'Q. Are you prepared to say, Mr. Starrett, that all of the vouchers which you certified as for construction were for material or work that added to the size of the plant, that increased its physical character as distinguished from replacing something that had been laid to one side or repairing the road? A. I am not, no, sir.'

Replying to the evidence of Mr. Scudder, the applicants introduced statements prepared from books and official reports made by the companies during several years as tending to show amounts of additions and betterments to the properties, but it appears that the books of the company whose money was claimed to have been spent in improvements of its properties were kept and controlled by the company or companies which had received and which spent the money, and that even deficits in operation were entered as additions and betterments. Entries in such books, vouchers and reports may be evidence that money did not go into the property, but that furnishes

no basis for a claim that entries elsewhere in those books show that other amounts did go into the property. The applicants' expert accountant said:

‘I have prepared myself on cross-examination to be ready to state what books I have seen or have had an opportunity to see and I am ready to meet that cross-examination, but the value of the stuff that is recorded in them I have by no means examined.’

So far as the evidence now before the Commission goes, it would seem that the total receipts of bond fund—about \$36,435,000—were used for the following purposes, all figures being only approximations:

To purchase stocks and bonds of subsidiary companies, nominal par value, \$5,465,400...	\$9,000,000
To pay notes, loans and accounts payable, the original purposes of which are not definitely shown, and other uncertain items...	8,600,000
To pay interest and coupons, including sundry minor expenses...	1,900,000
To pay taxes, assessments, lawyers' fees, operating expenses, etc.'...	1,400,000
To advance to subsidiary companies...	3,500,000
To pay for wages, materials, cars, machinery, contractors' claims and supplies...	12,000,000
Total...	<hr/> \$36,400,000

It is apparent that the evidence does not substantiate the assertion that the Third Avenue Railroad Company spent upon the corporate property and assets an amount equal to or in excess of the capitalization of the new company. But assume for the sake of argument that such an amount has been spent, does it follow that the Commission should approve for such a reason the pending application?

DOES EXPENDITURE PROVE VALUE?

A negative answer must be given, for the mere fact of expenditure of money does not establish either past or present value. For instance, the company bought stock of the Tarrytown Company and paid \$225,000 for a par value of \$300,000, but to-day it is admittedly worthless. Even the money loaned to that company will not be repaid beyond 50 per cent of the whole amount. Apparently, the stock of the 42d Street Company is to be cut off by foreclosure proceedings, and it too, costing nearly \$2,000,000, will then be valueless. Yet in each instance, the investment of money is undisputed.

The mere fact of investment does not establish a perpetual value not only because a mistake in judgment may be made but also because property may be allowed to deteriorate, because progress in the arts may make it obsolete, and because a change in economic conditions may decrease the use made of it by the public. It is a well-known fact and was stated in evidence that the physical property of the Third Avenue system was allowed to fall into disrepair. Certain lines are still operated by horses, certainly an obsolete method of transportation. Other lines have ceased to be of value, and their operation has practically been abandoned. To assert that because a company at one time put money into property which has become useless, worn-out and obsolete, a successor company which purchases that property at foreclosure sale should be allowed to capitalize for the amount originally expended is so absurd as not to require further discussion. Investment may be evidence of the good intentions of the investor, but it is not an infallible standard of perpetual value. *The Commission*

believes the proposition to be sound that capitalization should have a direct relation to value. The present application in part is under the provision of law that authorizes the Public Service Commission to permit the issuance of securities for the acquisition of property. The new Third Avenue Railway Company purposes to acquire from the Bondholders' Committee certain property formerly belonging to the Third Avenue Railroad Company and to issue certain stocks and bonds. The fundamental questions are, therefore, of what does this property consist and is the property of sufficient value to justify the proposed capitalization?

III.—VALUE OF PROPERTY.

This brings us to the third main argument made by the applicants, *viz.*, that the petition should be granted because the estimated cost of reproduction of the whole system fully equals 90 per cent of the par or face value of the securities. If 90 per cent, why not 100 per cent? If a deviation of 10 per cent may be allowed, why not 20, 30 or even 40 per cent? What shall be the stopping place? But first, as to the facts.

Briefly it may be said that the property to be acquired by the applicant company includes the assets of the old Third Avenue Company and the control through stock ownership or prior liens of the eight subsidiary companies, not including the Tarrytown Company. Less than 13 per cent of the stock of the subsidiary companies is held outside of the system. It would be exceedingly difficult to separate each company from the others and to value its property; and if it were desirable it would be impossible from the evidence in the case, for no such differentiation has been made. Apparently, the applicants have proceeded on the theory that the control of the subsidiary companies does not represent more than the total property of all the companies subject to the total obligations outstanding and in the hands of third parties. This is undoubtedly true, for the stocks, notes and accounts payable which the new company will hold cannot exceed in value the net worth, after all prior claims have been deducted, of the property which these stocks, etc., represent. It is proper, therefore, if one is viewing the whole Third Avenue system, to follow the example of the applicants and consider as the property of the new company the assets of the old company and of all the subsidiary companies, less the liabilities which must be met by the new company and its subsidiaries.

The applicants submitted an estimate of an engineer—Mr. Henry Floy—of the 'cost of reproduction by a new company,' which, they assert, amply justifies the proposed plan of capitalization. Mr. E. G. Connette, the transportation engineer of the Commission was asked to examine this estimate and inventory. After a thorough examination of the property and of the records of the Commission, with the aid of a staff of assistants, his findings were put in evidence, and he was questioned at length by counsel for the applicants. In many instances the two engineers agree, but in several important cases they differ considerably. In the main Mr. Connette's appraisal has been accepted, for he has had wide experience as superintendent and general manager of railroads and street railroads, steam and electric, including construction and operation, the changing from horse to electric traction, and the preparation of estimates for new work. Mr. Floy has never operated or managed a street railroad, and his general experience is not such as to cause the Commission to accept his estimates over those of Mr. Connette.

Before proceeding to the analysis of the evidence as to these appraisals, it should be stated that the Tarrytown, White Plains & Mamaroneck Railway Company will be omitted. The amount involved is very small and the facts are not clear.

COST TO SUB-CONTRACTORS.

Each engineer begins with the sub-contractors' cost of labor and material, assuming there is to be a general contractor also. Mr. Floy estimated such cost to be \$38,319,382, excluding the Mamaroneck line. Mr. Connette fixed \$37,595,458 as the

appraised cost of labor and materials, as shown in Table III. The net difference between the two appraisals is thus seen to be less than \$730,000.

TABLE III.**—COST OF LABOR AND MATERIALS.

Appraisal of Third Avenue System.—(September 1, 1909.)

Group.	3rd Ave and Union Rys.*	Yonkers R. R. Co.	Western Electric R. R. Co.	Total.
	\$	\$	\$	\$
1 Buildings and structures	5,066,934	356,989	161,807	5,585,730
2 Track	6,725,209	620,021	624,794	7,970,024
3 Paving	2,017,495	253,014	312,489	2,582,998
4 Distributing system	2,175,744	83,006	83,174	2,341,924
5 Overhead distribution	554,738	166,025	193,512	914,275
6 Duct lines	1,571,949	.....	.....	1,571,949
7 Power equipment	2,661,300	43,976	46,000	2,751,276
8 Rolling stock	6,453,097	95,515	82,250	6,630,862
9 Removing obstructions	1,169,209	.....	.....	1,169,209
10 Paving over obstructions	1,098,052	.....	.....	1,098,052
11 Real estate	4,265,220	74,000	35,900	4,375,120
12 Tools, supplies and fixtures	460,502	50,839	30,002	541,343
13 Horses, wagons, etc.	56,874	.....	.....	56,874
14 Salvage material and apparatus	5,822	.....	.....	5,822
Total	34,282,145	1,743,385	1,569,928	37,595,458

* In this column and under this heading in the following tables the figures are grouped for the Third Avenue Railroad proper, the 42d Street, Manhattanville & St. Nicholas Avenue Railway Company, the Dry Dock, East Broadway & Battery Railroad Company, the Kingsbridge Railway Company, Union Railway Company of New York City, the Southern Boulevard Railroad Company, and the Bronx Traction Company.

** In this table and elsewhere throughout this opinion, even dollars have been used for convenience.

Regarding the preceding estimates, it should be noted that they are based upon unit prices that are considerably in excess of what Mr. Whitridge has been paying for supplies. Where definite comparison was made, the difference was found to be from ten to twenty per cent. The unit prices are also in excess of the contract prices of the supply companies when the major portion of the work of electrification was performed. The applicants did not attempt to show what the entire present existing physical property had actually cost the company originally, but a few contracts were produced and these show that the unit prices used in the appraisal of Mr. Connette range from seven to forty-two per cent in excess of the contract figures. These facts clearly establish that the estimates given in Table III are ample, that the company has been generously treated and any action based on these figures will be very favorable to the applicants when viewed from the standpoint either of original cost of unimpaired investment or present cost to reproduce. This should not be forgotten, for it has been considered in reaching final conclusion.

The omission to show fully what were the unit prices at the time the present property was constructed is significant. Ordinarily, these would be important factors but only stray bits of information have been put in evidence. It is quite possible that the condition of the books and records of the various companies is such that the original cost prices cannot be determined.

Table III also contains certain items that are based upon arbitrary assumptions. The record of the case does not show what sub-surface obstructions were encountered in construction work, what was the condition of the paving when the work was begun, or the character and amount of the paving put down (See items 3, 9 and 10).

The engineer who made the appraisal of items (9) and (10), in the first instance arbitrarily took a five-foot strip and computed the cost of removing the obstructions and of repaving such a strip. It has not been established that the equivalent to such a strip was actually cleared and paved, but as Mr. Floy accepted the same figures, it may be considered that the applicants do not consider the estimate unfair to them. Item (3) is based upon present conditions also, and it is possible that the City may have improved the paving in some streets since the track was laid, for example, by substituting asphalt for macadam. If such is the fact, estimates (3) and (10) exceed the original expenditure. The appraised value of real estate also probably exceeds the cost, as present prices are the basis of the appraisal.

CONTRACTOR'S PROFIT, ENGINEERING, ETC.

To the cost of labor and materials already given, Mr. Floy added ten per cent for contractors' profit upon all items except (8), (11), (12), (13) and (14). To the amounts thus obtained, he added fifteen per cent on all items except (11) to (14) inclusive to cover engineers' and architects' fees, administration expenses during construction, incidentals, contingencies, etc. The total thus reached was \$46,389,805, the Mamaroneck line omitted as before.

Mr. Connette did not agree with Mr. Floy upon certain points. He did not add an allowance for contractors' profit or for engineering upon the cost of (9) removing obstructions and of (10) paving over obstructions. The estimates given in Table III were asserted to be sufficiently liberal to cover everything of that sort, and the estimate made by the engineer whose figures Mr. Floy accepted so state. Mr. Connette also maintained that five per cent upon (8) rolling stock, amounting to over \$331,500, was ample for engineers' fees, administration expenses, etc. Cars are ordinarily bought directly from the manufacturers who bear the expense of designing and testing and who charge prices sufficient to cover all such costs. The unit prices adopted by Mr. Connette include delivery in New York City, and the applicants presented no evidence through Mr. Floy or through any other witness to show that fifteen per cent, as estimated by Mr. Floy, or even ten per cent of the cost was ever paid by the Third Avenue Railroad Company upon rolling stock for engineering or administration.*

Mr. Connette also testified that a ten per cent allowance for the general expenses included under the heading of engineering, administration and incidentals computed upon items (1) to (7) inclusive is ample in this case. It is sometimes customary to allow five per cent for contingencies, incomplete inventories and unforeseen requirements. Here, however, the property to be appraised is in existence; it is not to be created. Further, unusual care has been exercised in making up inventories. The first step was taken by the companies themselves, or their receivers, and naturally they listed everything that could be called to mind. These lists were then checked and corrected by a consulting engineer in charge of the appraisal and his assistants. Mr. Floy, employed by the applicants, went over the inventories again to see if he could find anything that had been omitted or undervalued and added a small amount. Then Mr. Connette and his engineers verified the data, making virtually a fourth examination. It is believed that there are now practically no omissions or unappraised tangible property. Surely the allowance made by Mr. Connette will amply cover them, if there are any.

* Upon this point, the admission of the attorney for the applicants is worthy of note.

"Commissioner Maltbie: I am asking if he knows any company that has actually paid 15 per cent on its rolling stock.

"Mr. Guthrie: Common sense tells us that he does not know such company; such a thing does not exist, such a thing has never existed in the history of railroad construction. We don't pretend it has."

TABLE IV. COST TO REPRODUCE—NEW.

Appraisal of Third Avenue Railroad System. (September 1, 1909.)

Group.	Net cost.	Con- tractor's Profit.	Sum.	Engineer- ing,* &c.	Total.
	\$	\$	\$	\$	\$
1 Buildings and structures.....	5,585,730	558,573	6,144,303	614,430	6,758,733
2 Track.....	7,970,024	797,002	8,767,026	876,702	9,643,728
3 Paving.....	2,582,998	258,299	2,841,297	284,129	3,125,426
4 Distributing system.....	2,341,924	234,192	2,576,116	257,612	2,833,728
5 Overhead distribution.....	914,275	91,428	1,005,703	100,570	1,106,273
6 Duct lines.....	1,571,949	157,195	1,729,144	172,914	1,902,058
7 Power equipment.....	2,751,276	275,128	3,026,404	302,640	3,329,044
8 Rolling stock.....	6,630,862		6,630,862	331,544	6,962,406
9 Removing obstructions.....	1,169,209	**	1,169,209	**	1,169,209
10 Paving over obstructions.....	1,098,052	**	1,098,052	**	1,098,052
11 Real estate.....	4,375,120		4,375,120		4,375,120
12 Tools, supplies and fixtures.....	541,343		541,343		541,343
13 Horses, harness and wagons.....	56,874		56,874		56,874
14 Salvage material and apparatus.....	5,822		5,822		5,822
Total.....	37,595,458	2,371,817	39,967,275	2,940,541	42,907,816

* 5 per cent for Engineering, &c., is figured on rolling stock.

** The amounts given in the first column are sufficiently large to cover contractor's profit and all other allowances.

Table IV gives the appraisal made by Mr. Connette. He estimates the total cost to reproduce anew the entire property of the Third Avenue system to be \$42,907,816, or about \$3,500,000 less than Mr. Floy's appraisal. Mr. Connette considers that the question is not whether a certain percentage somewhat arbitrarily selected shall be applied to every item, but whether \$2,370,000 as a general contractor's profit and nearly \$3,000,000 for engineers' fees and general administration expenses during construction are sufficiently liberal. He considers that these allowances are adequate to cover an estimated period of construction of two years, which period is agreed to by Mr. Floy.

In this connection, it should be understood that the above allowance for contractors' profit is not the profit of the sub-contractors. The unit prices upon which Table III is based include a profit to sub-contractors. The contractors' profit of \$2,370,000 allowed in Table IV is a general contractor's profit. It is assumed that the company turns the work over to a general contractor. He sublets various portions to sub-contractors, and everybody takes his profit. Now it is not necessary nor is it customary for companies to follow such a practice throughout all their construction work. It is customary to do so at the start, but extensions are often made, new power houses built and additional equipment purchased without the aid of a general contractor. The company deals directly with the sub-contractors and eliminates the general contractor's profit.

The same is very largely true as to engineers' fees. When a company is started or an entirely new motive power installed, an engineer is employed to design the nucleus of the system. Extensions and additions are afterwards made along the same lines by adapting the old plans to the new conditions. The engineers of the company oversee the work and it is not found necessary except upon very new and difficult work to employ outside engineers at high salaries. The sum of \$3,000,000 to cover an average of two years' construction appears to be an adequate and liberal allowance, especially in view of the failure of the applicants to show that a larger amount was actually paid or is customary.

DEPRECIATION.

Thus far we have been concerned with the cost to reproduce the physical property in a new condition. But the property to be acquired by the new company is not new: some of it was dilapidated, badly worn and obsolete upon the date for which the appraisal was made—September 1st, 1909. It is necessary, therefore, in order to ascertain present value to deduct an amount for depreciation. Mr. Floy's figures are about \$1,400,000 less than those submitted by Mr. Connette, which are given in Table V. Possibly Mr. Floy made the error of considering as spent about \$1,000,000 which the company has not spent but purposes to spend. As the applicants include this \$1,000,000 among the purposes for which they desire to issue new securities, it should not be deducted from the actual depreciation.

The remaining difference between Mr. Floy and Mr. Connette is principally in one item—buildings and structures. The former considers the average life of buildings used for street railway purposes 100 years; the latter says 50 years is fully as long a period as should be considered to cover adequacy as well as age. The testimony of Mr. Starrett, formerly engineer for the Metropolitan Street Railway Company, is to the same effect, and a 50-year life seems the more reasonable. A building may still be in fair condition at the end of 50 years if properly maintained, but may be entirely inadequate for the use to be made of it.

In explanation of Table V, it should be stated that a secondhand value is not given to property immediately upon its being put into use. For example, a dynamo that is considered to have a life of 20 years, that is, to last 20 years before it will need to be replaced by another, is depreciated five per cent for every year of the expired term. It is not written down to its second-hand value if it has been in use six months. This method is considered proper, as the system is to be considered as a going concern and appraised as such. If "going concern value" were to be disregarded, the value of the property would be very greatly reduced. The "straight line" depreciation method has been followed by both experts and is not so far in error, if in error at all, as to necessitate a revision of the figures submitted.

From other viewpoints, the figures of Mr. Connette are certainly fair towards the applicants. No deduction has been made for anticipated progress in the arts. It is frequently pointed out that the electrical industry has passed through many metamorphoses and that there are still equally great changes to come. The depreciation computed by Mr. Connette is founded merely upon what is now in sight, and not upon the theory that some new invention or discovery will revolutionize the present street railway system and render useless a large part of the present property before it has worn out. This may happen, but it has not been discounted in Table V.

Upon three items—(9), (10) and (11), Table V—no depreciation has been computed. Obviously, real estate does not normally decline in value. It might be argued that a conservative financial policy would require a company to write off gradually at least a portion of the large amounts represented by items (9) and (10). But the Commission does not consider that a deduction should be required upon this ground.

Mr. Connette finds that the present value of the physical property of the Third Avenue system, nothing as yet being added for development expenses, was upon September 1, 1909, practically \$31,100,000. The method by which he reaches this figure is shown in Table V. Having determined "scrap value" and "wearing value" by subtracting scrap value from cost to reproduce new, he computes the total allowance for depreciation by adding the deductions to be made for "obsolescence, inadequacy and age", "deferred maintenance", and "wear and tear". This total is then deducted from wearing value which gives "remaining wear." This amount added to "scrap value" gives "present value." It should be noted that if scrap value is liberally estimated, the final estimate for present value will be liberal. Such is evidently the case, for it appears from recent sales of old material by the Receiver that property that Mr. Connette estimated as having a scrap value of over \$74,000, brought at actual sale only about \$46,000.

TABLE V.—DEPRECIATION AND PRESENT VALUE, SEPT. 1, 1900.
Appraisal of Third Avenue System.

Group.	Total Cost to Reproduce.	Scrap value.	Wearing Value.	Obsolescence, Inadequacy and Age.	Deferred Main- tenance.	Wear and Tear.	Total.	Remaining Wear.	Present Value.
1 Buildings and structures . . .	\$ 6,758,733	\$ 493,392	\$ 6,265,341	\$ 1,985,803	.....	.....	\$ 1,985,803	\$ 4,279,538	\$ 4,772,930
2 Track	9,643,728	579,272	9,064,456	201,484	566,000	.....	3,872,112	5,192,344	5,771,616
3 Paving	3,125,426	.....	3,125,426	.....	518,424	3,104,638	2,081,137	1,044,289	1,044,289
4 Distribution system	2,833,728	944,595	1,889,133	389,951	.....	1,562,713	558,174	1,330,359	2,274,954
5 Overhead distribution system	1,106,273	243,150	863,123	139,398	.....	168,823	366,580	496,543	739,693
6 Duct lines	1,902,058	.....	1,902,058	175,532	21,565	205,617	214,091	1,687,967	1,687,967
7 Power equipment	3,329,044	*253,438	2,938,890	956,490	.....	38,559	956,490	1,982,400	2,372,554
8 Rolling stock	6,962,406	255,600	6,706,806	1,621,694	.....	.....	1,621,694	5,085,112	5,340,712
9 Removing obstructions	1,169,209	.....	1,169,209	.....	.....	.....	.....	1,169,209	1,169,209
10 Paving over obstructions	1,098,052	.....	1,098,052	.....	.....	.....	.....	1,098,052	1,098,052
11 Real estate	4,375,120	.....	4,375,120	.....	.....	.....	.....	4,375,120	4,375,120
12 Tools, supplies and fixtures	541,343	.....	541,343	.....	.....	135,335	135,335	406,008	406,008
13 Horses, harness and wagons	56,874	.....	56,874	.....	.....	14,219	14,219	42,655	42,655
14 Salvage material and apparatus	5,822	.....	5,822	.....	.....	1,456	1,456	4,366	4,366
Total	42,907,816	2,769,447	40,001,653	5,470,352	1,105,989	5,231,350	11,807,691	28,193,962	31,100,125

* A figure of \$136,716, representing the Brook Ave. substation is included in the power equipment group, and appears in the columns for Cost to Reproduce and Present Value, but does not appear in the other columns in the group. The apparent discrepancy will be avoided by subtracting this figure of \$136,716 from the figure for Cost to Reproduce before making computations and then adding it to the result of the computations in order to obtain the Present Value. This figure was treated in this manner because a scrap value could not be obtained owing to the fact that an estimated value for the substation was used although the substation was not complete at the time of appraisal.

In order that the appraisal might be brought down to the date of the transfer of the property to the new company, or the day preceding the foreclosure sale, the applicants were asked to supply a list of the property acquired and actually delivered between September 1, 1909, and February 28, 1910. Mr. Connette was asked to complete the appraisal to February 28, 1910, so that all the physical property would be appraised which would be transferred and for which a liability had been entered upon the liabilities' side of the ledgers. Mr. Conette testified that the net additions to property had actually cost the receiver \$588,142. From this he deducted the appraised value of property withdrawn from service and disposed of, amounting to \$74,552, leaving \$513,590. He also testified that this item included about \$30,000 worth of property which had been delivered but for which no liability had been entered in the statement of liabilities to the Commission as of February 28, 1910. Consequently this also should be deducted, leaving net about \$483,600.

In Table V depreciation has been computed to September 1, 1909. It is, therefore, proper that credit should be given for any deferred maintenance that has been made good since that date and also that depreciation down to February 28, 1910, be debited. Mr. Connette testified that reduction in deferred maintenance had been \$352,310 and that accrued depreciation amounted to \$320,619, leaving a net increase in value of \$31,691. If we add this increase and the net result reached in the preceding paragraph to the value given in Table V, we obtain a total of *approximately* \$31,600,000 *as the present value of the physical property upon February 28, 1910, omitting development charges.*

ACTUAL VALUE VS. COST TO REPRODUCE NEW.

Although the applicants have presented evidence showing the estimated present value of the property, deductions having been made due to lack of repair, wear and tear, obsolescence, inadequacy and age, they argue that stocks and bonds should be allowed according to the cost to reproduce all existing property in a *new* condition and not in its present condition. The necessities of the case seem to require the applicants so to argue, for if depreciation be deducted the value will not justify the capitalization proposed, as will be seen later. If their position were to be accepted by the Commission, it would mean that instead of \$31,600,000, the property should be considered worth about \$42,900,000, development expenses yet to be added. In substance this theory means that if a street railroad company were to acquire the property of another street railroad company, it would not matter, so far as capitalization and value go, whether the property acquired was entirely new and in first class operating condition or whether it was worn out and obsolete. Under such a theory, the only question to be determined upon an application for the approval of stock and bonds would be, what would it cost to reproduce the property *new*? That having been determined, the case would be settled, no matter what might be the actual condition of the property.

Such a theory is unsound. The value of property is not determined by what it will cost to reproduce it new; its actual condition, its age, its adequacy, its fitness to the needs of the community are most important and fundamental considerations. Think of a company which has preserved all of its old horse cars, all of the machinery, plant and cars of a cable road, and all of the worn-out electric plant and equipment formerly used. This property is worth practically nothing except as scrap, but under the theory of the applicants, a purchasing company would be entitled to issue bonds and stock to the full amount of the cost to reproduce *new* all of these useless cars, equipment and plant, regardless of their actual value or what the purchasing company paid for them. But suppose, instead of preserving all of this useless stuff by storing it at considerable expense, the selling company had sold it for scrap before word had come of this new theory, then the purchasing company could capitalize the assets acquired only at the amount received for the scrap. That is, the mere scrapping or

destruction of property before a sale would reduce by millions the capitalization that might be approved.

It is also argued by the applicants that a plant, which is in first class operating condition, although its cars may be somewhat old, its rails worn and its machinery aged, is worth as much from an operating point of view as a plant which is practically new throughout. They doubtless mean that such a plant can earn as much as one which is practically new and represents in value 100 per cent of its cost of reproduction. If this theory be sound and a valid basis for action in this case, it would mean that of the \$10,000,000 or \$12,000,000 of depreciation, which even Mr. Floy, witness for the applicants, admits as a demonstrable fact, not more than \$3,000,000 or \$5,000,000 should actually be considered. Instead of subtracting from the cost of reproduction new about \$10,000,000, there should be subtracted but \$3,000,000 or \$5,000,000—or whatever amount of money would put the property in fair operating condition.

It may be that from a *gross* earnings point of view a system whose present value is equal to 75 or 80 per cent of its cost to reproduce new is nearly equivalent to a system whose present value is 100 per cent of its cost to reproduce new; but there are several considerations which prevent the complete acceptance of this theory when applied to *net* earnings. The cost of maintenance and repairs is less when a road is entirely new than when it is 75 per cent new. Plant and equipment become less efficient with age. But most important of all, the period is shortened within which provision must be made out of earnings for renewals, replacements and reconstruction. For example, take a street car which we will say, with ordinary usage and good management will last twenty years. Assume that it has been operated ten years and kept in first class condition so that it is giving good service. Nevertheless, that car is not worth as much to a purchaser or to a manager as a car that is one year old, and largely for the reason that a car that is ten years old has a remaining life of only ten years, and in those ten years the manager must accumulate a sufficient fund out of earnings to replace that car. In the case of the one-year old car, he has nineteen years in which to accumulate a fund equal to its cost; in the case of the ten-year old car, only ten years. In an extreme case, such as a dynamo which must be replaced in two or three years because near the end of its usefulness, as compared with a dynamo recently installed, it becomes quite apparent that the former, because it is nearer the time when it must be removed is not worth as much as the new dynamo which has just been installed. It was admitted by witness Floy that an old road could not be sold for as much as a new road, and that is practically the question at issue here, for the property of the old company is to be acquired by purchase by the new company.

SHOULD NON-EXISTING PROPERTY BE CAPITALIZED?

Closely associated with the above theories is the argument advanced by the applicants that as certain lines started as horse-car lines and as a few were changed into cable roads and then into electric roads, the new company should be allowed to capitalize not only the present value of the property actually taken over but the cost of the horse-car lines and the cable roads that have disappeared.

It should be noted in the first place, that there is no adequate information before the Commission to show how extensive or costly these changes were. There is considerable mileage still operated by horse cars. Many of the present electric lines were never horse-car or cable lines. They were built originally as electric lines. However, it is doubtless true that money was spent for horse-car lines and cable roads that have ceased to exist. The statement is made as to the Third Avenue Railroad Company, proper, that in the present book cost of road and equipment and in the liability which are outstanding, there is an amount of about \$2,000,000 for horse-car lines and equipment and about \$8,000,000 for cable roads. These figures have not been proved, but whatever may be the amounts, the question is whether the new company should be allowed to issue securities that do not represent any property to be acquired or necessary expenses connected with such property.

It is intimated that one reason for so doing is that it would have been difficult, and perhaps impossible, for the old company to have written off out of earnings the cost of the property which has disappeared. The difficulty has not been established as a fact; indeed the contrary seems to be true. During the period of horse-car operation, the Third Avenue Company declared dividends averaging about 13 per cent, ranging from 8½ per cent to 25 per cent. During this period, the company could have amortized or accumulated by sinking fund a sufficient amount to have paid off the entire cost of the road as set forth above, and still have paid dividends of over 8 per cent and founded a reserve fund besides. From 1891 to the time when electrification began, the average rate of dividend was somewhat less; and from 1900 to date the dividends have been very small. But the capitalization of the company represented not actual plant investment, but large premiums paid for stocks, interest charges and even operating expenses, as set forth in the previous pages. If from the beginning a reasonable amount as depreciation had been set aside out of earnings to take care of the various changes which have taken place, if the company had been conservatively financed and expenditures carefully watched, it is probably true, that dividends of 6, 7, or 8 per cent could have been declared and yet a sufficient amount have been accumulated to write off the old horse-car and cable roads that have disappeared.

However, it is the first duty of every company to see that its capital investment is kept intact. All charges for repairs, renewals and replacements should be met out of earnings, and dividends should not be paid until these expenses have been provided for in some way. It is evident that the Third Avenue Railroad did not do so, but issued new stocks and bonds instead. The result was that its capital was depleted, that it could not pay the interest on its bonds and that the property has been sold under foreclosure. Counsel for the applicants seem to be of the opinion that all a company needs to provide for out of earnings is its daily needs and mandatory demands, and that the stockholder is entitled to dividends regardless of provision for depreciation. They say:—

‘We venture to suggest that the just and true rule, applicable to public service corporations, will ultimately be found within the following lines: (1) that efficiency and safety of operation must be maintained in any event, (2) that repairs and maintenance must be provided irrespective of and before any return to the investor, (3) that the charge to the public must be limited to what is reasonable for the service rendered, and that this is to be measured by what is customary or duly fixed or necessary to secure a fair return, and (4) *that, after realizing a reasonable return upon the investment, it is the right as well as the duty of the corporate managers to see that from earnings the investment is kept unimpaired in value.*’

This policy has brought many roads to financial disaster. Companies that are soundly financed make ample provision for depreciation before dividends are paid, and the capitalization of replacements, repairs, etc., is only pardonable as a temporary makeshift to be avoided wherever possible. Neglect to keep investment unimpaired in order that dividends may be paid will lead to ruin.

The mill owner who has seen his machinery change decade by decade, who has seen revolutions in the arts which have compelled him to scrap his equipment several times, would be interested to know that he ought not to have charged the cost to operating expenses or accumulated surplus, but that he should have issued stock or bonds against these numerous replacements. It would be news to him to learn that he is entitled to earn a return upon not only his present plant but upon the half-dozen plants that have preceded the present one and have been destroyed. He knows that if he tried such a plan, came to bankruptcy, and found his property sold at foreclosure sale, the purchaser would not pay him for the property that had disappeared.

DEVELOPMENT CHARGES.

As already pointed out, no allowance has yet been made for interest and taxes during construction, organization expenses and other development charges. Certain items must still be added in order to determine the full present value of the property.

It should be recalled that certain general items have already been included in the appraisal, such as engineering, general superintendence and administration during construction. Naturally, nothing already allowed should be added here, but in the estimates presented by the applicants there is tendency to duplicate items. For example, the cost of obtaining consents from authorities and property owners is included in the allowance made for general administration expenses, the same item appears under development expenses. It is a legitimate charge, but should be included only once.

The applicants have asked that approval be granted to the issuance of securities to pay expenses connected with the organization and incorporation of the new company, a subject which will be considered subsequently. Witness Floy has included in development charges an estimate of the expenses connected with the incorporation, organization and promotion of the old Third Avenue Company. It is apparent that both cannot be granted. As a new corporation is to come into being, and as we are dealing with the issuance of securities for the new company, the estimated expenses connected with the establishment of the bankrupt company as a corporation should be omitted entirely from consideration. The new company does not take over the corporate organization of the old company.

Mr. Floy considers discounts and promoters' profits, aggregating fifteen per cent or 60 per cent of the total for development charges, as proper items to be included in the value of the property. This theory is wrong, for value does not depend upon the amount of discount or other inducements which a company must give in order to raise sufficient cash to pay for that property. If it did, the same property would have a greater value when purchased by a company having poor credit than by one having unlimited credit. It is undoubtedly true that the former company must issue a larger par value of bonds to raise the same amount of cash, than the latter. Similarly more 4 per cent bonds must be issued than 5 per cent bonds. These factors must be considered at the proper time, but it is improper to increase figures of cost or value by the discounts and other inducements which a company may need to give to investors and consider that the value of the property has been increased by the amount thus added. A building is not worth more because the owner has to discount the notes he gives to build it.

Mr. Floy has included interest and taxes not merely up to the time when operation begins, but also until the company can earn a sufficient surplus over and above operating expenses and interest to pay a reasonable dividend to the stockholders. According to this theory, the longer a company is unable to earn a fair profit for its stockholders, the greater will be the value of the property; but everyone knows that such is not the case. The same theory would justify stock dividends, for if a company is entitled to *capitalize* unearned dividends below a reasonable return, say six or eight per cent, it follows that it may issue securities for such unearned dividends. Would the converse be admitted by Mr. Floy, viz., that if a company earned a large amount amount above operating expenses, interest and fair dividends, such surplus should go to reduce capitalization? Such theories are neither sound nor practicable, and Mr. Floy could cite no case where they had been followed.

The applicants seem to have fallen into this error, through a failure to differentiate the present case from a rate case. It might be thought fair, if a rate were being fixed, to allow a company which had failed to earn a fair return upon its unimpaired investment during the early years of its existence to make up these deficiencies by larger earnings during the later years. But this principle is entirely different from the one enunciated by the applicants.

The proper period for the capitalization of development expenses ends when operation actually begins. Securities ought not to be issued to cover operating expenses, fixed charges or dividends after that time, except possibly in a most unusual case when such procedure is absolutely necessary to preserve the undertaking. In such an abnormal case, repayment must be made sooner or later out of earnings, and a company which attempts to secure dividends that are not earned by the issuance of securities has started upon the road which leads to financial disaster.

Interest during construction is undoubtedly a proper capital charge. Both Mr. Connette and Mr. Floy agree that the average period of construction would be about two years, and this estimate seems reasonable. As it is not necessary to raise the entire cost of the undertaking before work begins, but only such portion from time to time as will pay for the work completed, and as several large expenditures need not be incurred until just before the road is opened, it is customary to estimate the interest as equivalent to the normal rate upon the whole cost for one-half the period of construction or upon one-half the amount for the full period.

Mr. Floy estimates taxes at one-half of one per cent. This amount includes apparently every kind of tax from capital stock tax to franchise tax. It does not seem to be unreasonable and except so far as it includes taxes paid in connection with the corporate organization of the old company, it should be allowed.

Attention has already been called to the fact that the property has been valued as a going concern and that the appraisal is considerably larger than it would have been if this factor had been disregarded. However, it has been thought proper to make a still further allowance under this heading for the adjustment of the various parts to each other and the unification that must be brought about before an undertaking is harmoniously operated.

If we begin with Mr. Floy's estimates for legal expenses, proceedings, consents, interest and taxes, and omit duplications, corporate expenses of the passing Third Avenue Company and unearned dividends, reserving discounts, etc., for consideration elsewhere, the amount for development charges will be about \$3,500,000. In view of the large amounts which the Commission is asked to capitalize under the heading of reorganization expenses or expenses connected with the organization of the new company, the above amount seems adequate. It should be remembered also that the appraisal assumes the existence of a general contractor who receives 10 per cent on the work he oversees. This would reduce development expenses. Further, a company does not ordinarily wait until the whole system is completed before beginning operation. When a considerable portion is completed, it is put in operation and other lines are added from time to time. This method also operates to keep down expenses.

Adding the above amount of \$3,500,000 to \$31,600,000, there is obtained as *the total appraised value of the physical property upon February 28, 1910, \$35,100,000.*

CURRENT ASSETS.

Besides the physical property included in the above appraisal, the Third Avenue Railroad Company and the subsidiary companies had upon February 28, 1910, according to the books and records of the various companies, a considerable number of assets. The individual balance sheets of the various companies show a large number of inter-company accounts, appearing, of course, both upon the asset and upon the liability sides of the balance sheets. When one considers the entire system as a unit, these inter-company accounts can, of course, be omitted, as they neither represent upon the one hand accounts which can be turned into cash or actual property, considering the system as a unit, nor are they liabilities which can be collected by third parties and the company thus deprived of cash or actual property. In the following statement of assets and liabilities these inter-company accounts have, therefore, been properly omitted.

The books of the various companies and receivers contain the following assets in addition to the physical property heretofore considered:—

TABLE VI.—CURRENT 'BOOK' ASSETS OF THE THIRD AVENUE SYSTEM.

(Tarrytown, White Plains and M. R. Co. omitted.)

February 28, 1910.

(1) Cash on hand and in bank.. . . .	\$ 949,875 76
(2) Special deposits (other than those to pay coupons)	214,321 27
(3) Notes receivable.. . . .	510,490 18
(4) Accounts receivable.. . . .	347,181 51
(5) Prepayments.. . . .	18,687 10
(6) Miscellaneous.. . . .	17,061 44
(7) Stock of the Tarrytown, Wt. Plns. & M. R. Co..	225,000 00
(8) Claims against receivers of N. Y. C. Ry. Co. and of Met. St. Ry. Co..	411,300 00
Total.. . . .	\$2,693,917 26

Before allowing securities to be issued for all of these items, it is proper that each should be examined in order to determine to what extent the companies will probably be able to turn these book accounts into cash or actual property.

The first two items in the preceding table—cash on hand and special deposits—may be passed over without discussion and accepted at their full face value.

The third item—notes receivable—consists of three notes given by the Tarrytown, White Plains and M. R. Co. in favor of the Third Avenue, Union and Westchester companies. According to the accountant for the applicants, payments have been made on these notes of about 40 per cent of their face value. He estimates that the total amount ultimately realized will be between 40 per cent and 50 per cent, accrued interest being disregarded. If, therefore, we consider that the realizable value of these three notes is \$250,000, the applicants will be done no injustice; the amount actually received will probably be less.

Item (4)—accounts receivable—contains many items. For convenience they may be grouped as follows:—

Due from the Tarrytown, White Plains & M. R. Co..	\$ 157,388 75
“ Metropolitan Street Railway Company..	68,100 61
“ receivers of various street railway companies	40,608 57
“ solvent companies.. . . .	3,340 62
“ miscellaneous sources.. . . .	77,742 96
Total.. . . .	\$ 347,181 51

The account of the Tarrytown Company is in the same condition as the notes of that company above referred to and cannot reasonably be considered as a realizable asset for more than \$75,000. As to the amount due from the Metropolitan Street Railway Company, which is in the hands of receivers, there is no evidence to indicate that this account will be collected. Foreclosure proceedings are pending, and it seems probable, as this account ranks far down in the order of payment, that very little, if anything, will ever be realized. According to the books of the companies, they owe the Metropolitan Street Railway Company amounts far in excess of the amounts here considered. This claim might be used as an offset against the claims against the Third Avenue system by the Metropolitan Company. The other items may reasonably be considered as worth their face value, although it is quite possible

that not all will be collected. Omitting, therefore, a portion of the face value of the accounts due from the Tarrytown Company and the whole of the account due from the Metropolitan Street Railway Company, there remain \$196,692.15.

Item (5) and (6)—prepayments and miscellaneous—may be allowed at their face value.

Item (7)—stock of the Tarrytown Company—should be entirely omitted. If the notes and accounts of that company will be paid only to the extent of 40 or 50 per cent of their face value, it is evidence that the stock of the company is worthless.

The seventh item consists of (1) a claim of \$300,000 against the receivers of the New York City Railway Company and of the Metropolitan Street Railway Company for use and occupation of the Third Avenue lines between September 25, 1907, when the receivers were appointed, and January 11, 1908, when Mr. Whitridge was appointed as separate receiver for the Third Avenue Company, and (2) a claim for \$111,300 against the same receivers for award on property at 130th Street and Third Avenue. The latter claim has been passed upon by the courts and confirmed by the Appellate Division; an appeal of the Court of Appeals is now pending. A clerical error has been made in the amount of the interest. This item is allowed at \$100,000. The first item represents a mere claim which has not been passed upon by the courts or by a special master. Whether it can ever be collected in whole or in part is unknown, and the Commission does not believe that under such circumstances it should be considered as the basis for the issuance of securities, especially as it does not represent any payment actually having been made out of the securities of the old company or out of funds obtained by the receiver.

Mention is also made in the evidence of certain other claims which do not appear in the books as assets but which, it is stated, have been filed for prosecution in some of the various proceedings now pending, for instance, a claim of thirty millions of dollars by the Third Avenue receiver against the Metropolitan Street Railway Company and the New York City Railway Company for breach of the terms of the Third Avenue lease, covering non-payment of taxes, city claims, damage claims, and damages for not maintaining the property and damages for the balance of the term of the lease. There are also certain claims of controlled companies against the New York City Railway Company as follows:—

In favor of the Dry Dock Company for \$38,131.13, and for \$75,000.00 said to have grown out of the operation of the Dry Dock Company prior to the appointment of a receiver.

In favor of the Forty-second Street Company, from some questions of accounting for two or three years prior to receivership, for \$366,912.83.

In favor of the Union for various amounts growing out of transactions affecting the subsidiary companies, namely:—

\$54,944.87 (Yonkers).

\$53,617.95 (Southern Boulevard).

\$503,765.29 (Westchester).

\$180,052.53 (Tarrytown).

\$567,987.29, due to statement of accounts and damage suffered by the Union during some years prior to the appointment of a receiver.

In the words of one of the counsel for the applicants, referring to the claims last mentioned, it is impossible to state at the present time whether these claims will show a balance in favor of some of the controlled companies against the receiver of the New York City Railway Company or not. The companies against which these claims are being prosecuted are in the hands of receivers, and in some cases these receivers hold counter notes or claims. We have accordingly considered that the proof is insufficient to justify considering these amounts in this proceeding as a proper basis for the issuance of new securities.

Summarizing the above and omitting the physical property previously considered, the estimated realizable value of the current assets of the Third Avenue system becomes:—

TABLE VII.—ESTIMATED CURRENT ASSETS OF THE THIRD AVENUE SYSTEM.

(Tarrytown Company omitted.)

February 28, 1910.

(1) Cash on hand and in bank.. . . .	\$ 949,875 76
(2) Special deposits (other than those to pay coupons)	214,321 27
(3) Notes receivable.. . . .	250,000 00
(4) Accounts receivable.. . . .	196,692 15
(5) Prepayments.. . . .	18,687 10
(6) Miscellaneous.. . . .	17,061 44
(7) Claim against receivers.. . . .	100,000 00
(8) Stock of Tarrytown Co.. . . .	.. . . .
Total.. . . .	\$1,746,637 72

It is now possible to state the approximate appraised value of the entire property to be acquired by the new Third Avenue Railway Company. *The physical property has been appraised at \$35,100,000 and the current assets at, say, \$1,750,000; a total value of \$36,850,000.*

CAPITALIZATION OF INCOME.

Before considering the liabilities which must be assumed by the new company either directly or indirectly, it is perhaps advisable to examine briefly a theory advanced principally by Mr. Whitridge who was called as a witness for the applicants. He obtains a figure of \$60,000,000 as the present value of the property to be acquired by the new company over and above the underlying securities. He assumes *net* earnings available for interest and dividends on this amount to be \$2,400,000. Capitalizing this income on a four per cent basis he reaches \$60,000,000 and refuses to consider the intrinsic value of the physical property. For example, in response to Mr. Guthrie's queries he says:

'Q. In determining the value of such a property as the Third Avenue system, what, in your judgment, is the principal feature, the principal or controlling feature? A. Why, I only considered one feature; that is, what it would produce. The value of all things in the world which produce anything are valued, from the time of the Scripture down, are valued by the fruit, or yield of it. I know of no other measure of value for a thing, or anything else which produces anything than the income or yield.

'Q. Would your valuation of from \$55,000,000 to \$60,000,000 be affected by the fact that the tangible or physical property was worth less, separated from its use, or worth more than the amount you have named? A. I do not see that it makes any difference what the value of tangible property may be reckoned to be. The practical value, or for any purposes of value, must be reckoned by income, and you charge five cents. You cannot charge ten cents. Therefore it does not make any difference what the tangible properties are worth."

The capitalized value of earnings depends upon the rate per cent used. Mr. Whitridge selects four per cent because he believes that the securities of the new company will soon sell on a four per cent basis, but he cites no precedents or facts to support his

belief or hope. Judging the future by the past, this seems an unwarranted assumption and particularly dubious if the large amounts of bonds and stocks asked for by the applicants are issued, in view of the appraised value of the assets to be acquired. If the company were to be capitalized upon a conservative basis or upon the basis of the appraisal, it would be more likely.

But is it proper that the capitalization of a company should be fixed by its prospective earnings under certain conditions? It will be seen later that there is no evidence to show that the system has ever earned net \$2,400,000. The applicants say they hope the company will earn it in two or three years. But assume that it has earned it in some one year; should this be the basis for capitalization?

Other things being equal, net earnings depend largely upon the rate of fare, and the rates of a street railroad company may be regulated by the state. An ordinary business corporation fixes its own charges; it is not subject to state regulation; but a public service corporation does not have such privilege. The fundamental factor in rate regulation is a fair return upon the value of the property. Hence, if a company issued stocks and bonds upon the basis of earnings for a given year or period, and if it were found that the rates then charged were too high and were reduced by the state, resulting in the reduction also of net earnings, the capitalization once justified by earnings would be no longer proper. Upon this point, the evidence of Mr. Whitridge is interesting:

‘By Commissioner Maltbie:

‘Q. Does the rate of fare have anything to do with the net income? A. It has a great deal to do with the net income.

‘Q. Yes. If the rate of fare should be lowered, would the net income be lowered? A. I should be very much surprised if it was not.

‘Q. You think it would? A. Why, of course it would.

‘Q. If the Legislature should pass an act that the Third Avenue Line should sell six tickets for a quarter, would that effect this \$2,400,000? A. Undoubtedly,

‘Q. And if that act were held to be constitutional by the Courts, the certain income this Company would earn would not be \$2,400,000? A. It would not, unless something intervened to increase the increase.

‘Q. And then the amount of capitalization justified by the certain net income would not be \$60,000,000? A. I have said in all cases, in every answer I have given to that question, that I am assuming that we are on a normal basis, and things going on as they now are, without any catastrophe or cataclysm of any kind such as you say. I do not mean that the action of the Legislature is necessarily a catastrophe, but anything unusual. Of course, it is entirely within the power of the Legislature to destroy this property. It is entirely within the power of this Commission to destroy this property, and for aught I know, it may be within the power of other branches of the Government to destroy this property. I am assuming that we are on a normal basis and that things will go on substantially as we now are.

‘Q. You mean the passage of an act in the Legislature requiring you to sell six tickets for a quarter would be to destroy this property? A. I have not said that. I think that would diminish it.

‘Q. I was trying to make a connection between your last statement and what we are talking about. A. I do not say it would be destructive necessarily, but it would diminish the earnings. But I can conceive of legislation that might be passed which would destroy it.’

If, therefore, fares and thus earnings are to have a relation to actual value, and if capitalization is to be determined by earnings, why not get down to fundamentals and cause capital to have a direct relation to actual value of the property. Otherwise, the basis would be uncertain and shifting. The state would use one standard in a rate case and another in the present case. How much more fair to use the same standard in both cases, so that securities once approved would not be utterly disregarded in a rate case? In its opinion upon the first application, the Commission said:

'If the Commission were to approve the issuance of securities as proposed, and a rate case *were* presented for its determination, the question: How far is the Commission bound to recognize the securities it has authorized and allow a fair return to the holders thereof, would become vital. Suppose the investigation in the rate case should show that the value of actual property, tangible and intangible, were but a fraction of the capitalization authorized by the Commission previously. Suppose it was also plain and indisputable that fares could be lowered and still pay all operating charges, taxes and a generous return upon the actual value of the property, but that such lower fares would not provide a sum sufficient to pay interest on the authorized issue of bonds and a fair return upon the stock. Suppose also that the property had been kept up and that the company had in no way been mismanaged, but had been faultlessly operated, would the Commission be justified in ordering the reduction of fares? If the Commission had not approved the securities in the first instance, it undoubtedly would be. But even if it would be legal, it cannot be equitable or moral for a public body to sanction overcapitalization, either knowingly or because it neglects to ascertain the facts in the case, and later to issue an order the inevitable result of which will be to deprive the holders of the securities of their reasonable interest and dividends. The Public Service Commission cannot run with the hare and chase with the hounds. It must be just to all, remembering that when an issue of bonds is approved the public believes that they represent actual property, physical in most part or in whole, and that there is a strong probability that interest will be paid, provided ordinary management and foresight are used. No more desirable result could be attained than that holders of stocks and bonds, the issuance of which has been approved by this Commission, shall come to feel that they represent actual property, dollar for dollar, that no investigation or case however comprehensive will raise any doubt upon this point, and that reasonable rates no matter by whom fixed will allow a fair return upon their stock, barring mismanagement and misjudgment in the company itself. It is imperative therefore that the Commission be convinced beyond peradventure that the securities which it approves are based upon property and not merely upon hopes or expectations. A failure to apply the test rigidly will lead to bad results.'

LIABILITIES.

Turning to the liability side of the ledgers, one finds a large number of inter-company items which should be eliminated in order to ascertain the net obligations which must be considered as liens or charges against the property of the various companies. The books of the individual companies naturally also include among their liabilities the capital stock issued. In four instances—Bronx Traction Company, the Westchester Company, the Kingsbridge Railway Company and the Union Railway Company—all of the stock was directly or indirectly held by the Third Avenue Railroad Company. There are four cases where a certain proportion of the stock is held outside of the system.

Company.	Total Par Value of Stock Issued.	Held Out- side of the System.
42d St., Man. & St. Nich. Ave. Ry. Co..	\$2,500,000	\$828,900
Dry Dock, E. B. & Bat. R. R. Co..	1,200,000	71,300
Southern Boulevard R. R. Co...	250,000	1,700
Yonkers R. R. Co...	1,000,000	7,500

The books of the Third Avenue Railroad Company naturally treat as liabilities of that company the stock actually issued, par value of \$15,995,800, and likewise the consolidated bonds, with interest thereon, amounting to \$42,292,548.86 as of February 28, 1910.

Eliminating all inter-company liabilities, all securities of the individual companies held by any other company in the system, and the stock and bonds which are to be wiped out by the formation of a new Third Avenue Railway Company or for which new securities are to be issued, we have, according to the books of the companies in the Third Avenue system, the following list of liabilities outstanding and in the hands of third parties:

TABLE VIII.

"BOOK" LIABILITIES OF THE THIRD AVENUE SYSTEM.

(Tarrytown, White Plains & M. R. Co. omitted.)

February 28, 1910.

(1) Receivers' certificates and notes.. . . .	\$3,755,000 00
(2) Funded debt—first mortgage bonds.. . . .	10,892,000 00
(3) Funded debt—other liens (Third Avenue bonds being foreclosed not included)..	1,240,000 00
(4) Real estate mortgage.. . . .	12,000 00
(5) Accrued interest on the above items (1) to (4)	276,340 70
(6) Notes payable.. . . .	7,242,843 95
(7) Accrued interest on notes payable.. . . .	1,614 58
(8) Accounts payable.. . . .	993,443 82
(9) Special franchise taxes, due and accrued.. . .	849,737 92
(10) Real estate and other taxes, due and accrued	75,994 99
(11) Employees.. . . .	25,635 09
(12) Tort creditors.. . . .	667,755 66
(13) Judgments against Third Avenue Co.. . . .	47,104 65
(14) Capital stock held by third parties (except stock of Third Ave. Co.).. . . .	909,400 00
(15) Miscellaneous.. . . .	397,861 85
Total.. . . .	<hr/> \$27,386,783.21

Although all of the above appear upon the books of the companies, a number were omitted from a consolidated statement of liabilities prepared by the applicants on the request of the Commission. Before accepting the "book" accounts or this statement of the applicants, an analysis should be made of the above schedule.

Items (1), (2), (3), (4) and (5) are clearly real liabilities to the full amounts given.

Item (6) is made up of notes payable to the following, of which those amounting to \$78,000 are admitted as actual liabilities:—

New York City Railway Co..	\$1,701,809 15
Metropolitan Street Railway Co..	5,255,934 80
Metropolitan Securities Co..	107,100 00
Mercantile Trust Co..	100,000 00
Miscellaneous.. . . .	78,000 00
Total.. . . .	<hr/> \$7,242,843 95

The notes given by various companies to the New York City Railway Company are claimed by the applicants to be impressed with the lien of the mortgage now being foreclosed and to belong, therefore, to the companies in the Third Avenue sys-

tem. If this is ultimately established to the satisfaction of the court, these notes will become inter-company accounts and should be eliminated in any consolidated statement of net liabilities. In this connection, it should be noted that unbooked claims against the New York City Railway Company amounting to over \$1,800,000 were excluded from the statement of assets.

The obligation to the Metropolitan Street Railway Company has been wiped out by foreclosure proceedings, and, therefore, may be disregarded here. It may be set up as a counter-claim against the large claims of the Third Avenue Company above referred to, but at the present moment there is no reason why it should be treated as a liability.

The notes in favor of the Metropolitan Securities Company and the Mercantile Trust Company are eliminated by the applicants on the ground that the Third Avenue Railroad Company received no value for the notes. They are in existence, however, and upon the books. In view of these facts, it does not seem proper that they should be eliminated, but rather that they should be included at the face value, making the total amount of notes payable which are considered as good and valid, \$285,100.

The statement prepared by applicants as to the amount of accrued interest on notes payable—Item (7)—is doubtless correct if one admits their claim that the only notes payable to be considered as real liabilities are those for \$78,000. As we have added two other notes, the interest thereon should also be added here. The record does not show with exactness what the interest would be, but subject to correction by further proof, it may be considered with the rest as \$30,000.

Item (8)—accounts payable—is made up of the following items:

Miscellaneous.. . . .	\$355,760 63
New York City Ry. Co. and receivers.. . . .	597,867 05
Metropolitan Securities Co...	34,763 16
Metropolitan Street Ry. Co...	5,052 98
<hr/>	
Total.. . . .	\$993,443 82

The obligations grouped under the heading, "Miscellaneous", are admitted by the applicants, but they dispute all others. They assert that the amounts said to be due to the receivers of the New York City Railway Company are not due to them, but to the company itself. The basis for this position is the further assertion that the accounts were not kept in proper manner and that funds paid to the New York City Company were applied by the receivers to the period prior to September 24, 1907, when they should have been applied to the period subsequent to September 24. If this claim should ultimately be sustained, the accounts payable to the New York City Railway Company—totalling nearly \$600,000—would become impressed with the lien of the mortgage. Like the notes payable above referred to, they would then become inter-company items, and, therefore, to be eliminated in a combined balance sheet. As to the last two items, the attorneys for the applicants state that they believe they will be able to prove that these accounts need not be paid. However, there is no evidence in the case to show upon what ground they will be disputed, and the books certainly indicate that they are real liabilities. Neither item will be wiped out by any foreclosure proceedings now pending. The net liabilities under this heading will be considered as \$390,523.79.

The amounts due and accrued for taxes—items (9) and (10) are genuine obligations and may be taken for the purpose of this case at the figures given in the table. The same is true of the obligations to employees—Item (11).

Item (12)—tort creditors—is in part estimated, the estimates for most of the companies being 10 per cent. of the claims. In the case of the Third Avenue Company the tort creditors may be wiped out by the foreclosure sale recently held. Foreclosure proceedings are pending in the case of the 42d Street Company, but the appli-

cants were unable to state whether claims against that company would thereby be made worthless. The Bondholders' Committee has purchased about one-half of the amounts due to tort creditors by the companies, and apparently intends to turn them over to the new company at actual cost. If this is done, tort claims and judgments representing a face value of \$295,867.45 will be reduced to an actual liability of only \$152,895.02. If the same course should be followed with the other claims, and no interest charged by the Committee for carrying these payments, the net liability would be about one-half item (12). It is, however, impossible to make a definite estimate; probably the amount will not be far from \$400,000.

Item (13), according to the applicants, will be wiped out by foreclosure.

Item (14)—stock of the subsidiary companies held outside of the system—should be very materially reduced, for it is stated that the foreclosure proceedings now pending in the case of the 42d Street Company will wipe out all of the stock and eliminate any liability to third parties for the amount they now hold, having a par value of \$828,900. The remaining amount, \$80,500, represents the par value of a small amount of stock in the Dry Dock, Southern Boulevard and the Yonkers companies. For the purposes of this case, this may be treated as a liability to the par value. No foreclosure proceedings are pending, and there is, therefore, no reason why it also should be eliminated.

Item (15)—miscellaneous—covers the following, and the applicants admit their liability for the full amount:—

Legal services, franchise cases.	\$ 4,900 00
Counsel, accountants and Special Master, est.	35,000 00
Receivers' Fees, estimated.	135,000 00
Track rent, accrued.	3,200 00
Fire Loss, suspense account.	79,957 49
" " "	133,657 96
Suspense cash received.	4,042 18
" " "	2,104 22
Total.	397,861 85

Summarizing the above conclusions and omitting as before the bonds of the Third Avenue Railroad being foreclosed and the stock, the estimated amount of the real liabilities which should be set off against the assets of the system are as follows:—

TABLE IX.

ESTIMATED CURRENT LIABILITIES OF THE THIRD AVENUE SYSTEM.

Including Receiver's Certificates and Underlying Securities.

(Tarrytown Company omitted.)

February 28, 1910.

(1) Receiver's certificates and notes.	\$ 3,755,000 00
(2) Funded debt—first mortgage bonds.	10,892,000 00
(3) Funded debt—other liens (Third Avenue bonds being foreclosed not included).	1,240,000 00
(4) Real estate mortgage.	12,000 00
(5) Accrued interest on the above.	276,340 70
(6) Notes payable.	285,100 00
(7) Accrued interest on notes payable.	30,000 00
(8) Accounts payable.	390,523 79

(9) Special franchise taxes, due and accrued.	\$ 849,737 92
(10) Real estate and other taxes, due and accrued.	75,994 99
(11) Employees.	25,685.09
(12) Tort creditors.	400,000 00
(13) Judgments against Third Avenue Co.	
(14) Capital stock held by third parties.	80,500 00
(15) Miscellaneous.	397,861 85
Total.	<hr/> \$18,710,744 34

Having analyzed both assets and liabilities as they will be acquired or assumed directly or indirectly by the new company, it is now possible to determine what is the value of the assets unrepresented by liabilities.

TABLE X—ASSETS AND LIABILITIES COMPARED.

Value of Physical Property, as previously determined.	\$35,100,000 00
Current Assets, Table VII.	1,746,637 72
Total Assets.	<hr/> \$36,846,637 72
Current Liabilities, Table IX.	18,710,744 34
Net.	<hr/> \$18,135,893 38

This amount is very nearly the intrinsic value of the property that is represented by the consolidated bonds and stocks of the old company, which have a face value of \$53,560,000.

In view of the result just reached it is perhaps of interest to recall that the Bondholders' Committee bid in the property at foreclosure sale for \$26,000,000 without opposition.

If the Commission were to accept the theories of the applicants and adopt their contention that the property is worth \$58,125,000, the liabilities of the system would even then exceed the assets by about \$10,000,000.

The above amount—\$18,100,000—does not include the necessary expenses which must be incurred in the organization of a new company. Neither does it contain any allowance for discounts upon securities. These two factors, together with the refunding of certain outstanding obligations, remain to be considered before one can determine the gross amount which may legitimately be represented by securities.

OTHER FINANCIAL NEEDS.

The applicants desire to refund certain obligations given in Table IX, such as receivers' certificates, franchise taxes and interest thereon. In view of the method used in computing the net value of the property, there is no good reason why the new company should not be allowed to fund any of these debts that are due and that appertain to the new company. The exact amount is somewhat uncertain, but it can easily be determined with the co-operation of the applicants. It would be improper, however, to issue *additional* securities to pay the non-assenting bondholders; their share must come out of the \$18,100,000, for their share of the property has been included in the property appraised, but the liability corresponding thereto does not appear among the liabilities subtracted. For the purpose of illustration, suppose that the total amount of liabilities to be paid off in cash, which appear in Table IX, be considered \$6,000,000. This amount must be added to the net cash value given in Table X.

Having taken out the expenses connected with the incorporation and organization of the old company, it is proper that there should be added the necessary and

reasonable expenses connected with the starting of the new company. These have been estimated at about \$800,000, including the mortgage tax and certain reorganization expenses, but the exact amount cannot now be determined and will remain indefinite for some time. The Commission is willing to allow securities to be issued for all necessary expenses. If the total should be found to be unusually large, it may be necessary to require that a part be amortized out of earnings within a reasonable time.

The applicants have also indicated that about \$1,000,000 are needed to repair the tracks of the Third Avenue line proper and about \$1,000,000 to put the property of subsidiary companies into first-class condition. As the appraisal accepted by the Commission is cost less depreciation, it is proper that the first named sum be allowed, provided, of course, the full amount is actually used to improve the condition of the track and not merely for wear and tear. The same is true of the amounts to be loaned to the subsidiary companies, provided the advances be made to receivers and these loans be placed on a par with the receivers' certificates that have been issued, if any, or be made prior liens by the receivers. Both amounts are merely estimates, but whatever is actually needed may be capitalized.

In view of the uncertainty as to the exact amount that will be needed for organization expenses and for the improvement of tracks and other property, it may be wise to follow a plan that has been tried and found satisfactory. The Commission having authorized the issuance and sale of securities, the money thereby obtained is placed in a separate fund. Payments are made from this fund after the amount and character of an expenditure are accurately known and after it has been shown that the expenditure is properly chargeable to capital.

This plan has the advantage upon the one hand that it permits a company to secure funds in advance of its needs without necessarily making short time loans at the bank at high interest rates. It also permits securities to be sold *en bloc* and the funds utilized as required. Upon the other hand, the public is protected against overcapitalization and the payment of operating expenses out of bond moneys. The investor finds this of advantage and the company is thus able to raise money at lower rates because the investor has less risk to run.

Assuming that the probable needs of this new company are about as stated above and that the plan just suggested is carried out, the cash requirements become, let us say, for illustration:—

(1) Net value of property to be acquired (Table X).	\$18,150,000 00
(2) Obligations to be refunded, estimated at..	6,000,000 00
(3) Expenses of organization of new company, estimated..	800,000 00
(4) Improvement of plant, estimated..	2,000,000 00
Total..	\$26,950,000 00
Practically	\$27,000,000.

As we have proceeded so far upon a cash basis practically, the question now arises, what allowance should be made for discounts and commissions? It is evident that the amount depends largely upon the character of the securities issued and their relative values. If the only kind of bond issued is a consolidated mortgage, five per cent, 50-year gold bond for about one-half of the above amount, that would be one thing. But if the interest were made four per cent, the discount would necessarily be increased.

It is clearly impossible to state, from the record of the case, just what allowance would be fair, from the relation of stocks and bonds on a \$27,000,000 basis is not shown. However, a few factors that should be considered are pointed out in this opinion, and if the applicants will amend their petition and present a plan adjusted to the facts and views stated in this opinion, the matter can doubtless be easily adjusted. It should be added that whatever discounts, commissions and expenses are

allowed to be capitalized must be amortized out of earnings during the life of the bonds.

In view of the conclusions thus far reached and the desirability of reconsideration by the applicants of the proposed plan of financing the new company, it is not now necessary to go into an elaborate discussion of probable earnings. There is one fundamental principle that has to do with the relative amount of bonds and stocks that should be kept in mind. *The Commission believes that the amount of capital represented by bonds should not be in excess of the amount upon which there is definite certainty that interest may be earned.* It would obviously be unwise and useless to approve a plan which might easily mean another foreclosure and reorganization in a few years. This is the second time within ten years that the Third Avenue Company has been in the hands of a receiver. It is time that a conservative plan were adopted and upon such sound principles that another cataclysm will not be necessary.

DO EARNINGS JUSTIFY PLAN?

The applicants maintain that their proposed plan of reorganization is justified by the *prospect* of increased earnings. During the progress of the case, Mr. Guthrie, counsel for the applicants, said:—

'Mr. Semple, do you realize that after all, the property to-day is not earning 4 per cent on the cost of reproduction? Do you realize that the figures before you show not \$2,400,000 in hand, but hope for \$2,400,000? Do you realize that to-day it is less, probably, than \$1,800,000? Have you not got a demonstration right there that if anybody wanted to put in between 50 and 60 million dollars to reproduce that property, there would be several years before even four per cent of the money would be returned? Who is to guarantee to the capitalist, who puts in between 50 or 60 million dollars, that from the beginning he will get \$2,400,000 net? The bankers hope that it will be so in the future, if they can build up a business, but it is not fair for any purpose to take this property to-day as actually earning net \$2,400,000—and the figures before you do not justify it.'

So far as earnings go, therefore, the only basis for the proposed plan is the hope that the net income will increase, and the process by which the applicants reach their estimates is interesting. They begin with the following statement for the year ending September 30, 1909 (the Yonkers, Westchester and Tarrytown lines being omitted):—

Gross earnings.. . . .	\$6,304,719 44
Expenses.. . . .	4,027,838 88
Net earnings.. . . .	\$2,276,880 56
Sale of power—Less Cost.. . . .	411,813 24
Rental of Equipment.. . . .	146,399 00
Interest and Miscellaneous.. . . .	25,113 75
	<hr/>
	\$2,860,206 55
<i>Deductions:</i>	
Interest on \$9,150,000 of bonds.. . . .	469,500 00
Interest on loans and mortgages.. . . .	109,534 48
Taxes and Car Licenses, not including Franchise Taxes	313,960 10
Hire of equipment and other Rent Deductions.. . .	187,680 66
Extraordinary Expenditures for Improvements, etc..	96,631 31
	<hr/>
	\$1,177,306 55
Surplus.. . . .	1,682,900 00

Franchise taxes not having been paid and nothing having been set aside for depreciation, the above amount of \$1,682,900 was evidently not the true net income. To cover these items, there was deducted \$382,900, leaving \$1,300,000 as the estimated amount available for interest and dividends upon the new securities. It is apparent that this balance would only partially meet the demands which would be made upon it if the applicant's plan were carried out. These would be:—

Interest at 4 per cent on refunding Bonds.. . . .	\$ 631,600
“ 5 “ income bonds.. . . .	1,126,800
Dividends at 6 per cent on stock.. . . .	995,400
Total.. . . .	\$ 2,753,800

Indeed, net income of \$1,300,000 will barely pay the interest on the refunding bonds and three per cent on the income bonds, with nothing remaining for the holders of the common stock.

It is evident that such a statement of earnings would not justify a capitalization of \$55,000,000. Considerable testimony was presented to show that the net income in future years would be considerably greater. Mr. Bronner, called as a witness, submitted the following estimate of probable future earnings:—

Earnings as stated in Plan for year ended Sept. 30, 1909..	\$ 1,682,000
Power to Westchester Companies.. . . .	112,000
Savings in interest on receivers' certificates, loans, etc..	103,000
Savings of lawyers' and master's fees.. . . .	50,000
Savings in repaving.. . . .	40,000
Prospective earnings from Westchester companies..	100,000
Probable Yearly Increase.. . . .	200,000
	<hr/>
	\$2,287,000

When Mr. Bronner's attention was called to the fact that even this estimate did not provide an adequate return to the stockholders, he admitted that they were depending upon 'prospective earnings' for dividends. Mr. Whitridge estimated that the system would reach a normal condition in two or three years, and that then there would be available for interest and dividends upon the new issues, about \$2,400,000 after paying all taxes and \$300,000 for depreciation. But this amount falls short of paying even five per cent on the stock.

The estimates of Mr. Bronner and Mr. Whitridge contain many uncertain quantities. The amount charged to the Westchester companies for current has been reduced from 1½ cents to 1¼ per k. w. h., reducing the estimated credit to about \$93,600. The saving in interest on receivers' certificates depends upon the rate at which the bonds are sold and the discounts. The reduction in the cost of legal expenses and paving is an estimate and may or may not be realized. The increase in the net earnings due to the growing business of the system is probably exaggerated. Previous years show no such growth. The changes in the few months of last fall cannot be used as a basis, for they are the heaviest business months in the year for surface railroads in New York City, and the causes of the increase will not again be duplicated. The full operation of the roads by new cars of the P. A. Y. E. type has been at last practically completed, through which the full collection of fares is practically secured. The cars are new and expenses of maintenance and equipment have been at a minimum. They will increase.

It is clear, therefore, that the assumption that gross earnings will continue to increase and operating expenses to decrease at the same rate as recently is unwarranted. Further, there are several important items of expense that have been omitted. Nothing was set aside for depreciation or other reserves, and certain expenses, such as franchise taxes and receivers' salaries, were not paid. Mr. Whit-

ridge, called as a witness by the applicants, estimated the franchise tax at from \$160,000 to \$170,000, and this figure was accepted by the Bondholders' Committee in their petition. The Westchester and Yonkers companies were not included, and their taxes would increase the amount somewhat. The receiver's salary is estimated by the applicants at \$5,000 per month or \$60,000 per year.

Much evidence was submitted upon the subject of depreciation. That property depreciates is an indisputable fact, and the failure to recognize and provide for it has brought low many corporations. Unless the investment of security holders is kept intact by a depreciation fund or some other similar means, the day will come when there will be no funds or property to represent their securities. The street railway situation in Manhattan for the past three years is an ominous warning, and any one who unduly minimizes the subject of depreciation harms not only the investor, but the public.

Various estimates for depreciation were submitted in evidence. Mr. Bronner estimated it at \$300,000, but admitted that he knew of no street railway company where five per cent had proved sufficient as an annual depreciation reserve. Mr. Whitridge said from \$300,000 to \$340,000 would be sufficient for this case, or about 4½ per cent of gross earnings. But in the transfer case, relative to the exchange of transfers between the 59th Street and the Third Avenue lines, where it was advantageous from the standpoint of the company to show small net earnings, Mr. Whitridge testified that ten per cent would be necessary in addition to proper maintenance charges, which is equivalent to over \$700,000, on the basis of 1908-9 receipts, omitting receipts from the sale of power and the rental of land, buildings, track, equipment, etc. In the special franchise tax litigation, the decision of the court was that an allowance of about nine per cent of gross receipts should be made. Upon this basis, the deduction would be over \$630,000. Mr. Floy, the only engineer called as a witness by the applicants, testified that in his opinion \$300,000 set aside annually and compounded would be sufficient to cover obsolescence, but not the retirement of property because of age or inadequacy. He also stated that the amount would need to be 'considerably larger' if it were to cover replacements and that it would be preferable to provide such a fund in advance of the need. One method suggested, that of issuing long-term notes, bonds or stock to provide for replacements or renewals, is unsound and dangerous. It leads to overcapitalization and financial suicide.

If only normal wear and tear be provided for directly out of operating expenses, obsolescence, inadequacy and age must be met by a depreciation fund or some similar fund. The question is, how much should be set aside annually for this purpose? Mr. Connette and Mr. Floy agree upon the average life of most parts of the road, but disagree as to the expected life of buildings and structures. Mr. Floy says 100 years; Mr. Connette, 50 years, and this period seems more nearly correct. With the changing conditions in street railway operation, it does not seem reasonable to assume that buildings will last upon the average 100 years. If not torn down, they will have to be thoroughly remodelled long before a century rolls around.

If we assume that all provision for normal wear, depreciation, etc., on all property except buildings and structures, power plant equipment, and rolling stock be made directly out of earnings, the amount which should be set aside annually for depreciation on these three divisions of property would be about, using the straight line method and the valuations of the applicants:—

Power plant equipment—5 per cent.	\$175,000
Rolling stock—5 per cent.	380,000
Buildings and structures—2 per cent.	145,000
Total.	\$700,000

The applicants have argued that allowance should be made for compound interest instead of simple amortization as above. If this were done and interest compounded semi-annually at the rate of 5 per cent per annum, the annual payments would be about:—

Power plant equipment—20 years.. . . .	\$105,000
Rolling stock—20 years.. . . .	230,000
Buildings and structures—50 years.. . . .	35,000
Total.. . . .	<u>\$370,000</u>

The sinking fund method would be very efficacious if it were possible to allow the payments to accumulate without drawing upon the fund, but it is not possible to do so. Replacements must be made year by year. For example, street cars do not have the character of the one-horse shay, all collapsing at the same time. Consequently, the fund would not compound without interruption. At times the demands would doubtless not be as great as the payments, and there would be some compounding. It would not be safe, however, to consider that the annual contribution could be reduced below \$500,000, if the capitalization were to be that proposed by the applicants.

Provision should also be made for other reserves. No prudently managed company distributes every dollar of its net earnings. A contingent reserve to be used in emergencies and to meet unforeseen contingencies should be accumulated. It need not be large, and a part of one per cent of the gross earnings would probably be ample.

The financial results for the *entire* Third Avenue system, the Mamaroneck line excluded, for the fiscal year ended June 30, 1909, the last for which sworn reports have been made to the Commission, were:—

Gross earnings.. . . .	\$7,049,942 36
Operating expenses.. . . .	<u>4,610,314 89</u>
Net earnings.. . . .	\$2,439,627 47
Taxes.. . . .	308,341 30
Improvements.. . . .	<u>111,526 32</u>
Leaving a balance of.. . . .	\$2,019,759 85

It was argued by the applicants that the 'improvements' scheduled were capital expenditures and should not have been charged against earnings. The sworn reports show that a total amount of \$177,629.88 was spent, and each report states that these expenditures 'were partly in the nature of renewals and partly those of improvements,' or words to that effect. Nearly all of it was for 'track and roadway' or 'engineering and reconstruction.'

In view of these facts, and in view of the dilapidated condition of the system when it went into the receiver's hands and the need for many and expensive repairs which have not yet been completed, it is clear that a large part and possibly all of this amount should be charged against earnings. As a credit against the total amount spent, there was placed the sum of \$66,103.56, received from the sale of cars and old material. These receipts should clearly have been credited to capital and used for capital purposes. Hence, if the difference—\$111,526.32, or about 60 per cent of the gross—be deducted from earnings, the net income will not be unduly depressed.

From the balance above given, there should be subtracted several items. The amounts have perhaps been placed too low; if they have the results will be more favorable to the applicants' plan than the facts warrant.

Net balance for 1908-9.. . . . \$2,020,000

Deduct:

Franchise tax below estimate of witnesses..	\$150,000
Receiver's salary.. . . .	60,000
Depreciation.. . . .	500,000
Reserves.. . . .	<u>30,000</u>
	740,000

Net income.. . . . \$1,280,000

This is the amount available for interest on all securities of the various companies and dividends on stock.

As already pointed out, the applicants assert that the returns for the year 1908-9 are not a fair indication of the yield of the system. The figures for the year ending June 30, 1910, are not yet available to the Commission, but those for the 9 months ending March 31, 1910, are in evidence. Briefly summarized, they are (the Mamaronock line omitted):—

Gross earnings.. . . .	\$5,699,567
Operating expenses.. . . .	3,457,316
Net earnings.. . . .	<u>\$2,242,251</u>

Deduct:

Taxes (only a small amount of franchise tax is included).. . . .	286,298
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Net for 9 months.. . . .	<u>\$1,955,953</u>
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The following estimated expenses not having been paid or allowed for should be subtracted (9 months):—

Remainder of franchise tax.. . . .	\$ 90,000
Receiver's salary.. . . .	45,000
Depreciation.. . . .	375,000
Other reserves.. . . .	20,000
	<u>530,000</u>

Leaving net income of.. . . .	<u>\$1,425,953</u>
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Assuming for the sake of illustration that the net income during the remaining quarter of the year was about one-third of this amount, we have as a total estimated net income for the year 1909-10 about \$1,900,000, operating expenses being unusually low.

The business for 1910-11 will doubtless increase somewhat. Upon the basis of a growth in gross earnings of about 5 per cent over 1909-10, they would be, say, \$7,500,000. Mr. Whitridge has testified that operating expenses cannot be reduced much, if any, below 65 per cent of gross earnings. Taxes, except franchise taxes, usually amount to about 5 per cent of gross earnings. The results would be on these bases:—

Gross earnings.. . . .	\$7,500,000
Operating expenses—65 per cent.. . . .	4,875,000
Net earnings.. . . .	<u>\$2,625,000</u>

Deduct:

Taxes—5 per cent. of gross.. . . .	\$375,000
Franchise taxes.. . . .	150,000
Depreciation.. . . .	500,000
Other reserves.. . . .	30,000
	<u>1,055,000</u>

Net income.. . . .	<u>\$1,570,000</u>
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If the operating expenses could be cut to 60 per cent, which figure was nearly reached during part of 1909-10, the net income would be \$1,945,000. If gross earnings were to reach \$8,000,000 and operating expenses 60 per cent, and if taxes were to decline, reserves to be omitted and depreciation to be reduced, the net income might be made to reach \$2,300,000.

Before obtaining the amount available for interest on the \$55,000,000 of proposed new securities, there has yet to be deducted the interest on the underlying securities, mortgages, and notes payable of the subsidiary companies (see items (2), (3) and (6) of Table IX), which would be about \$640,000. There would then remain according to the various figures given above:

(1)	For the year 1908-9	\$640,000
(2)	" " 1909-10	1,260,000
(3)	" " 1910-11 (Operation, 65 per cent.)	930,000
(4)	" " 1910-11 (" 60 ")	1,305,000
(5)	" " when receipts are large and expenses small, as stated above	1,660,000

Even these figures are too high, for nothing has been subtracted for the amortization of discounts, commissions and expenses connected with the distribution of such bonds.

Compare these results with the following requirements according to the plan outlined for approval.

Interest on refunding bonds	\$631,600
" income, "	1,126,800
Dividends on stock, at 6 per cent.	995,400
Total	\$2,753,800

It is at once apparent that as the results for the year 1908-9 would barely be sufficient to pay interest on refunding bonds; the holders of the other securities would receive nothing. In 1909-10 and 1910-11, the holders of income bonds might receive two or three per cent. But earnings would have to be very materially increased and expenses decreased to enable the company to pay five per cent on the income bonds. Earnings will probably increase from year to year, but the evidence does not warrant the prediction that the stock would receive even a small dividend for many years to come, and it is most uncertain when full interest would be paid on the income bonds. *Viewed from the standpoint of earnings alone, the Commission believes the plan is not justified, unless interest should be paid and dividends declared at the expense of the property; and such a method is improper and unwarranted.*

If the plan were approved, the effort to earn interest and dividends upon the securities would inevitably tempt managers to give inferior service at high rates. No matter how excessive the issues of stocks and bonds, the manager feels that he is expected to earn dividends and interest thereon, and every time he is able to increase the rate of profit by a fraction of one per cent he adds to his reputation. Naturally, therefore, he is very strongly tempted to try to squeeze an extra one per cent out of the service or the fares. Whereas, if the capitalization were smaller, it would be easier to earn interest and good dividends without robbing the service.

Although it is universally recognized that the issuance of securities does not produce value or income, the applicants have definitely stated that they prefer issuing \$55,000,000 of securities to a smaller amount. Apparently one reason for this attitude is that many believe that when this Commission approves an issue of securities it is good evidence that there is genuine property back of them. The State has not undertaken to guarantee a return upon investment, but certainly there is an expectation that this Commission will not allow securities to be issued which are not represented by property and upon which there is no probability that there will be a return.

In conclusion, it may be said that upon the record of the case the petition of the applicants could have been denied without any extended discussion of the issues involved. But the Commission desires to facilitate an early reorganization of the Third Avenue system upon a sound and permanent basis, and has believed that a

decision setting forth the attitude of the Commission upon the questions presented in connection with this application would aid in this direction.

The summary herein given of the facts as the Commission perceives them may also aid in bringing about results. In the discussion of the reported assets and liabilities, it was seen that it is at present impossible to say what certain claims will yield and what the actual liability will be in certain instances. It is not believed that the findings in Tables VII and IX will be far amiss, but the Commission will willingly modify its findings in view of any new facts that may be produced. It may be pointed out, however, that an increase in actual assets will not be a loss to the company, even though the capital may not be increased accordingly. Such increase may be considered an earning. Upon the other hand, if liabilities increase, the company may make application for permission to issue additional securities. In neither case will any harm come to the company by reason of the principles laid down in this opinion. Adjustments will need to be made from time to time as the rehabilitation of the system progresses, and each case may be taken up on its merits.

Pending the submission of a revised plan, the issuance of a formal order will be held in abeyance, so that an opportunity may be given the applicants to amend their petition and to submit proof upon certain points upon which there is doubt. There are several other matters to be considered besides the issuance of securities, but that is so fundamental and so many others depend upon it that it is considered preferable to dispose finally of the question of capitalization before proceeding to take up the other matters.

In this connection it may be pointed out that the rejection of the plan now before the Commission does not necessarily involve a refusal to allow the stockholders of the old company to participate in the profits of the new company unless they make a generous contribution to pay an assessment. Doubtless the stockholders of the old company through the directors they selected were responsible for present conditions, but many of them were not individually cognizant of what was being done. The share of the earnings allotted to them does not depend upon the amount of stock they hold. They would receive the same share with an issue of \$1,600,000 par value or \$800,000 as with \$16,000,000.

In the Matter of the Application of James N. Wallace, Adrian Iselin, Edmund D. Randolph, Mortimer L. Schiff, James Timpson and Harry Bronner, composing a Bondholders' Committee of bonds issued under the First Consolidated Mortgage of the Third Avenue Railroad Company, dated May 15, 1900, for approval of the issue of \$15,790,000 First Refunding Mortgage Bonds, \$22,536,000 Adjustment Mortgage Income Bonds, \$16,590,000 Capital Stock, by a new company contemplated in the Plan of Reorganization of said Third Avenue Railroad Company, in respect to the Application of the Third Avenue Railway Company, Intervenor, for the Consent of the Commission to Certain Mortgages.

Case No. 1181.

Reorganization of Corporations—Authorization of Mortgages—Power of Commission to Require Modification or Omission of Proposed Clauses.—The T. A. Ry. Co., a corporation formed pursuant to a Reorganization Plan formulated by a Bondholders' Committee under Sections 9 and 10 of the Stock Corporation Law, applied to the Commission for its consent to the issuance of two corporate trust mortgages, to secure securities contemplated by that Reorganization Plan. HELD,—that in view of the provisions of the order of the New York Supreme Court and the principles enunciated by the Court of Appeals as to the construction of the present provisions of

the statute, the Commission, while disapproving of certain provisions of these mortgages, and saying that it would require certain changes to be made if it had the authority so to do, does not believe that it now has authority to refuse its consent to the issue of the two mortgages, or to insist that any proposed clauses thereof be omitted or modified.

Issuance of Stock and Bonds—Provision of Income Mortgage for Payment at Maturity of Deficiency Interest not Previously Met.—That the Commission might, in a case where the statutes as construed by the courts empowered it so to do, object to, and require the omission or modification of, a proposed clause in an adjustment income mortgage, that unless interest shall have been paid at the rate of five (5) per cent for each of the forty-eight years from 1913 to 1960, the holders of the income bonds shall be entitled to receive, upon the maturity thereof, not only the par value of the bonds, but also an additional amount equivalent to the deficiency below five (5) per cent for any or all of the preceding years,—suggested, but not decided.

Accounts—Amortization of Discounts—Provision for Eventual Refunding of Bonds.—The Commission has power to require the amortization of the difference between the fair value of the corporate property and the par value of the securities to be issued, by the appropriation and reservation each year, out of annual income or surplus accumulated after the issue of the bonds, of an amount not less than the proportionate amount of such difference to the end that upon the date of maturity, the company may, in refunding the bonds then due, present as the basis for such refunding, property to an amount equal to the par value of the securities.

Accounts—Amortization of Discounts—Difference between Par Value of Securities and Fair Value of Property.—The Commission had authorized the issuance of certain bonds and stock of the T. A. Ry. Co. and had consented to the execution and delivery of two corporate trust mortgages to secure the same. It appeared, from testimony taken before the Commission: (1) that the total liabilities of the T. A. Ry. Co. system, including the new stock and the new refunding and income bonds, were approximately, \$73,626,744.34, and the total assets to be paid over, approximately \$44,046,637.72; (2) that, even assuming the current liabilities unfunded would be paid out of operating expenses, the excess of liabilities over assets would be upwards of \$26,000,000; (3) that the par value of the new securities is \$54,916,000, and the probable cash proceeds thereof under the Bondholders' Committee's own estimate would be only \$33,384,200; and (4) that, consequently, assuming the property to be maintained by annual cash expenditures and a depreciation fund, at maturity in 1960, there would still be a difference of at least \$25,000,000 between the total capitalization and the fair value of the property, even if the cash now paid in is used to increase the value of the property. **HELD**,—that, in order that this difference, which is in the nature of a discount upon securities, may be eliminated during the life of the bonds, an amount, to be determined by the rate at which the fund will accumulate, but not less than four (4) per cent (or \$180,000 plus four (4) per cent upon previous payments and accumulations), should be set aside by the company annually out of income, before dividends or interest on the income bonds may be paid.

Accounts—Amortization of Depreciation—Twenty (20) Per Cent of Operating Revenue as a Depreciation Reserve.—Under all of the circumstances stated, it is necessary, in order to avoid another repetition of the financial collapses which have been so conspicuous in the history of the street railways in Manhattan, that the T. A. Ry. Co. should reserve, for the upkeep of the property, including current maintenance and future replacements, at least twenty (20) per cent of the operating revenue of the company, the Commission, however, not thereby fixing twenty (20) per cent as the

maximum rate, or as the rate applicable to all cases, or as one which the Commission would not modify upon application should it prove too high.

Hearings closed January 9, 1912. Opinion adopted February 3, 1912.

The application of the Third Avenue Railway Company, as intervenor, was that the Commission consent to the issuance of the two corporate mortgages contemplated by the Reorganization Plan of the Bondholders' Committee of the Third Avenue Railroad Company. In connection with the authorization of these mortgages, the Commission considered the subject of the amortization accounts of the Third Avenue Railway Company.

The Opinion adopted by the Commission on January 17, 1912, authorizing the issuance of the stocks and bonds called for by the Reorganization Plan, together with the decision of the New York Court of Appeals in conformity with which such action was taken, will be found in this volume, at page 21, *ante*.

The general requirements of the Commission on the subject of the amortization or cancellation of depreciation and similar items, will be found, as to street and electric railways, in the 'Uniform System of Accounts' prescribed by the Commission in 1908. Included therein is the following provision:

Until otherwise ordered, the 'amount estimated to be necessary to cover such wear and tear and obsolescence and inadequacy as have accrued during' any month shall be based on a rule determined by the accounting corporation. Such rule may be derived from a consideration of the said corporation's history and experience during the preceding five years, and the accrual may be on the basis of revenue car miles. Whatever may be its basis, such rule and a sworn statement of the facts and expert opinions and estimates upon which it is based shall be filed with the Public Service Commission on or before July 1, 1909; each amendment of such rule and a sworn statement of the facts and expert opinions and estimates upon which such amendment is based shall be filed with the Public Service Commission before it is used by the accounting corporation, and shall show the date when it is to be effective.

In the present case, the Commission, in the course of the hearings upon the proposed Reorganization Plan, took testimony on the subject of the probable discounts and the proper annual allowance for depreciation. On the basis thereof, the Order of February 3, 1912, was formulated, with leave to the company to apply for a modification thereof should the minimum prescribed therein for the proposed amortization accounts be found unsatisfactory.

The Order entered on February 3, 1912, after the Commission had by separate Order authorized the execution and delivery of the mortgages in question, provided, on the subject of the proposed amortization accounts and funds:

Section 2. It is ordered, that for the purpose of making up the difference between the value of the property mortgaged in and by said mortgages and the face value of the bonds which have been authorized by the Commission under said mortgages and the par value of the stock of said Company, the said Third Avenue Railway Company shall establish and maintain an amortization fund, and, before paying interest on its bonds secured by said adjustment income mortgage or paying dividends on its shares of stock, shall pay in cash into said fund out of income of said Company, in each calendar year, beginning with the year 1912, an amount of money which shall be not less than one hundred and eighty thousand dollars (\$180,000), plus four (4) per cent. upon all prior payments into said fund, until said fund shall amount to twenty-five million dollars (\$25,000,000). Said fund shall be used only for the purchase and retirement of mortgage bonds of said Company or for the acquisition of property for capital or investment purposes.

Section 3. It is ordered, That the Third Avenue Railway Company, before paying interest on its bonds secured by said adjustment income mortgage or paying dividends on its shares of stock, shall expend or set aside for maintenance, depreciation and renewals during each and every fiscal year during the term of forty-eight years from January 1, 1912, a sum equal to twenty per cent of its gross operating revenue for that particular year, and if this amount is not expended for said purposes during any one year, then at the end of such year the unexpended portion thereof shall be credited to a separate depreciation fund. The whole or any portion of the amount accumulated in such fund may be used from time to time for maintenance, repairs, replacements and renewals in addition to the annual expenditures for such purposes required in said mortgages. The fixing of said amount herein as the minimum amount to be expended or set aside annually for maintenance, depreciation and renewals shall not be held or considered as lessening or limiting in any way the Company's obligation to expend whatever sum or sums may be necessary to be expended for such purposes in order to keep the railway and its appurtenances in thorough repair, working order and condition in every respect and at all times, with all needful renewals and replacements as provided in said mortgages.

Further facts appear in the Opinion adopted.

Oliver C. Semple, for the Commission.

Herbert J. Bickford, for the Third Avenue Railway Company.

George W. Davison, for the Bondholders' Committee of the Third Avenue Railroad Company.

By the Commission: By an order adopted January 17, 1912, the Commission authorized, in pursuance of an order issued by the Supreme Court of the State of New York and in obedience thereto, the issue by the Third Avenue Railway Company of the following securities:

\$15,790,000 face value, of first refunding mortgage fifty year four per cent gold bonds, dated January 1, 1910;

\$22,536,000 face value of adjustment mortgage fifty year five per cent. income gold bonds, dated January 1, 1910;

\$16,590,000 face value of stock;

as provided in the said plan and agreement of reorganization submitted by said applicants to the Commission and bearing date December 2, 1909. An opinion relating thereto was adopted by the Commission at the time of the issuance of the order.

In the application before the Commission, consent to the issue of two mortgages was requested: (1) A first refunding mortgage to Central Trust Company of New York, as trustee, dated December 20, 1911, to secure an issue of \$40,000,000 face value of bonds of the company, such bonds to be dated as of January 1, 1910, to be payable on January 1, 1960, and to bear interest from January 1, 1912, at 4 per cent per annum, payable semi-annually; and (2) an adjustment income mortgage to United States Mortgage & Trust Company, as trustee, dated December 20, 1911, to secure an issue of \$22,536,000 face value of bonds of the company, such bonds to be dated as of January 1, 1910, to be payable on January 1, 1960, and to bear interest from January 1, 1912, at the rate of 5 per cent per annum, cumulative, provided the company shall have earned 5 per cent per annum.

In view of the provisions of the order of the Court and of the principles enunciated in the opinion of the Court of Appeals, the Commission believes that it has no authority to refuse its consent to the issue of the two mortgages, even though it may not approve

certain provisions in these mortgages. For example, objection might be made to the provision in the income mortgage that, unless interest shall have been paid at the rate of 5 per cent for each of the 48 years from 1913 to 1960, the holders of the income bonds shall be entitled to receive upon January 1, 1960, not only the par value of the bonds but an additional amount equivalent to the deficiency below 5 per cent for every one of the preceding years. But under the order and opinion of the Court, the Commission has no authority to insist that this or any other clause shall be omitted or modified.

The Commission, therefore, consents to the execution and issue of the two mortgages, but expresses no opinion as to the propriety of the terms and conditions in such mortgages. Indeed, if the Commission had authority, it would require certain changes to be made. The two most important relate to the establishment of reserve funds for depreciation and obsolescence, and for amortization of the difference between the fair value of the property and the par value of securities to be issued under the plan of reorganization.

AMORTIZATION OF DISCOUNTS.

The requirement that discounts shall be amortized is a generally recognized principle. The unanimous conclusion of the Railroad Securities Commission in its recent report to the President of the United States was to this effect: "It seems to be generally agreed that no limitation should be placed on the price at which bonds can be sold, but any discount should be cancelled or amortized during the life of the bonds by the appropriation each year out of annual income or surplus accumulated after the issue of the bonds of not less than the proportionate amount of the discount." The Securities Commission also said, regarding the issue of stock below par, that the difference between par value and cash received should be amortized within a short term of years, thus:

If a document says one hundred dollars has been paid, one hundred dollars ought to be paid. The most that can properly be done is to allow companies which cannot sell such stock at par to arrange for the 'amortization,' or gradual cancellation, of any necessary discount by appropriating, out of future income or surplus which may accrue subsequent to the issue of such stock an annual sum having precedence over dividend payment, to be so applied on capital account as to make the deficiency good in a period of no very great length."

The Public Service Commission has approved the issue of approximately \$100,000,000 par value of bonds exclusive of the securities of the reorganized Third Avenue and Metropolitan Street Railway companies. Probably 90 per cent of these securities have been 3½, 4 or 5 per cent bonds, issued at less than their par value. It has been the invariable practice of the Commission to require the difference between the cash proceeds of the bonds and their par value to be treated the same as bank discount or interest paid in advance and to be amortized within the term of the obligations. The propriety of this requirement has never been contested by any of the corporations affected. This procedure is in accordance with well established principles of accounting and with the rules of accounting prescribed by the Interstate Commerce Commission and the two Public Service Commissions of New York and other regulatory bodies.

In the previous opinions in this case, the Commission found the total liabilities of the entire Third Avenue system, after eliminating book entries, inter-company accounts, etc., to be approximately:—

Receiver's certificates and notes	\$3,755,000 00
Funded debt of Third Avenue Company	5,000,000 00
Funded debt of underlying companies	5,892,000 00
Funded debt—other liens	1,240,000 00
Real estate mortgage	12,000 00
Other current liabilities—estimated	2,811,744 34

New refunding bonds.....	15,790,000 00
New income bonds.....	22,536,000 00
New stock.....	16,590,000 00
Total.....	<u>\$73,626,744 34</u>

Upon the other side of the account, the Commission found the following assets and funds to be paid over:—

Physical property estimated to have a value at that time of about.....	\$35,100,000 00
Current assets.....	1,746,637 72
Cash assessment.....	7,200,000 00
Total.....	<u>\$44,046,637 72</u>

The excess of liabilities over assets is thus seen to be nearly \$30,000,000. If the revisions in current liabilities and assets requested at a former hearing were allowed, the excess would be nearly \$29,000,000. Even assuming that the current liabilities unfunded would be paid out of operating expenses, there would still remain an excess of upwards of \$26,000,000.

The Bondholders' Committee estimated that the 4 per cent bonds might sell for about 80, which is equivalent to a yield of slightly more than 5 per cent per annum when account is taken of the fact that a bond now bought for \$800 will be redeemed by the company at its maturity for \$1,000. The market value of the income bonds was estimated at 70, and the stock at about 30. Thus, upon the Committee's own estimate the par value of the new securities exceeded the cash by \$21,500,000, shown as follows:

Par Value	Cash Value
\$15,790,000 4 per cent. refunding bonds @ 80.....	\$12,632,000
22,536,000 5 per cent income bonds @ 70.....	15,775,200
16,590,000 stock @ 30.....	4,977,000
<u>\$54,916,000</u>	<u>\$33,384,200</u>
Total.....	

(From the letters of Henry Floy, Engineer, and Guthrie, Bangs & Van Sinderen, counsel to the Bondholders' Committee, printed in the proceedings of the directors of the Third Avenue Railway Company and filed as Exhibit F with the petition of the company, May 26, 1910.)

Assuming that the property is maintained by annual cash expenditures and a depreciation fund, it would follow that in 1960, when the bonds become due, there would still be a difference between the total capitalization and the value of the property (assuming that the amount of cash now paid in will be used to increase the value of the property) of approximately \$25,000,000.

In order that this difference, which is in the nature of a discount upon securities, may be eliminated during the life of the bonds, it is necessary that an amount should be set aside annually out of income before dividends and interest on the income bonds may properly be paid. It is evident that the annual amount is determined by the rate at which the fund will accumulate. It is certainly not less than 4 per cent, and upon this basis the annual payment would be \$180,000 plus 4 per cent upon previous payments and accumulations. If this course is followed, the company in 1960 will have a fund which, together with its other property, assuming it to be maintained as above stated, will be equivalent to the par value of the securities then outstanding.

It is apparent that if the company is able to earn only 4 per cent upon this fund, either through investments in securities or in its own property, the net deduction will be \$180,000 per annum. If, however, the company is able to earn even more than 4 per cent per annum, the income above 4 per cent will work to reduce the net annual

charge against income by the precise amount which the actual earnings exceed 4 per cent. If, for example, the company should be able to earn 6 per cent per annum, the net amount would be less than \$100,000.

Unless some such plan is followed, the company will not be able in 1960, in refunding the bonds then due, to present as the basis for such refunding property which is equal to the par value of the securities. They will be represented in part by discounts upon issues of 1912, 50 years before.

DEPRECIATION.

The foregoing requirement has reference only to the *present* impairment of capital. This impairment of capital has resulted to a considerable extent from the neglect of the old company to make proper provision for depreciation. If the company does not reserve a sufficient portion of its revenue to replace capital consumed during the year but not requiring replacement within the year, and then proceeds to treat the entire surplus as divisible profits, it is actually violating the corporation law against the declaration of dividends out of capital just as effectually as though it sold stock and distributed the proceeds immediately in the form of dividends. Unless, therefore, careful provision is made for the creation of a depreciation reserve, there may be another repetition of the financial collapses that have been so conspicuous in the history of the street railways in Manhattan.

Under the Third Article of the first refunding mortgage and the Fifth Article of the income mortgage, the company agrees and covenants to maintain property by making needful repairs, renewals and replacements, and under the Second Article of the refunding mortgage it further agrees that no bonds shall be issued for replacements or operating expenses. To provide for such replacements, however, there ought to be some definite provision for a depreciation reserve. The matter assumes a special importance in view of the fact that the declaration of interest upon the income bonds will depend upon a precise definition of expenses and other deductions that may be made from revenue. Without clear definitions there is an almost certain likelihood of disputes between the income bondholders and the stockholders as to the true amount of the profits. The Second Article, Sub a, of the income mortgage enumerates the various items of expense to be deducted from revenue and specifies depreciation or obsolescence, but leaves the amount of such charge to be determined entirely by the discretion of the board of directors. When it is recalled that in one case where it was the object of the company to show small earnings Receiver Whitridge testified before the Commission that the total annual depreciation amounted to \$600,000, and that in a second case where it was the object of the company to show large earnings the same receiver testified that depreciation amounted only to \$300,000, one will realize the necessity of a more specific definition of depreciation.

In the opinion of the Commission there should be reserved out of revenue for the upkeep of the property, including both current maintenance and future replacements, in accordance with the accounting rules of the Commission, at least 20 per cent of the operating revenue of the Third Avenue Railway. This minimum rate has been used in other mortgages and contracts; is practically the standard percentage used by engineers in appraising street railways, and more especially is the rate estimated by the chairman of the Reorganization Committee of the Metropolitan Street Railway Company.

The Commission does not fix 20 per cent as the maximum rate or as the rate applicable to all cases. Further, if this rate should prove to be too high after a number of years, the facts may be presented upon application to the Commission for a modification of this Order. But it is of prime importance that the situation into which the street railways of Manhattan drifted a few years ago be not repeated. Therefore, the Commission directs the company to provide and maintain two reserve funds, one for depreciation and one for the amortization of excessive capitalization,

so that the bondholders may have property of some sort wherewith to reimburse the holders of securities.

In the Matter of the Application of the NEW YORK AND NORTH SHORE TRACTION COMPANY for the approval of the issuance of stock and bonds under Section 55 of the Public Service Commissions Law.

Case No. 1398.

Issuance of Stock and Bonds—Approval of State Should Mean Proper Relation to Cost of Property.—While it is true that, if the Commission should authorize securities having either double or one-half the par value considered reasonable, the earnings of the corporation would not in either event be affected thereby, yet it is important that when the State stamps its approval upon stock and bond issues, they should have a proper relation to the cost of the property.

Construction Companies—Identity of Control with Parent Corporation—Formation Not Favored by Commission.—The Commission does not favor the formation of a construction company by the persons who control the corporation with which such construction company is to do business.

Valuation—Amount Actually Expended—Purported 'Cost Figures' Accomplished through Identity of Control not Accepted as Basis for Action by Commission.—The N. Y. and N. S. T. Co. presented figures which showed that, omitting interest, its actual disbursements for new construction totalled \$1,169,041.99, including the actual payments for engineering, superintendence, legal fees, franchise payments and expenses, syndicate fees, and the like. It asked that the Commission thereupon approve the issuance of securities on a basis of approximately \$330,000 in excess of such actual payments. As a reason for thus abandoning actual cost as a guide in determining the amount of securities properly issuable, the applicant pointed out that the construction contract under which the work had been done provided for the addition of certain percentages, and urged that the 'actual cost' should be capitalized only with these additions. This construction contract was with a corporation nominally separate from the N. Y. and N. S. T. Co., but the construction company had no previous existence and no organized staff, and was actually controlled by the same persons as the traction company. It appeared that the traction company could itself have done all of the work with equal facility, and it was admitted by one of the officers of both corporations that the real reason for doing the work through a construction company was to have a contract that would afford a warrant for a larger issue of securities. HELD,—that this was not a valid reason, as securities must be based upon some solid ground, such as value or cost, not varied with the multiplication of inter-company relations, and the arbitrary percentages of the so-called construction agreement will not be accepted as basis for anything.

Courts—Formation of Construction Company as Device to Obtain Federal Jurisdiction.—The officers and stockholders of a railroad corporation, who had formed themselves into a construction company to do certain work of railroad building, sought to justify this course by saying that separate incorporation in New Jersey enabled them to better defend damage claims, through the removal of any suits to the United States Courts. HELD,—that this Commission does not encourage corporations to resort to the Federal Courts to escape damage claims.

Valuation—'Cost-of-Reproducing-New'—Engineering and Contractor's Profit—Arbitrary Percentages vs. Actual Figures.—It was urged that, in determining what amount of securities should be authorized, the Commission, if rejecting, as such, the figures obtained by adding the percentages provided for in the construction contract, should accept the amount actually disbursed as a beginning point only and then proceed to add certain arbitrary percentages for contractor's profit, engineering, superintendence, and similar items of overhead charges, thus following in a capitilization case the precedent in certain rate cases where the Commission based its determination to a considerable degree upon the estimated cost of reproducing a plant new, deducting depreciation. HELD,—that the Commission does not, for several reasons stated in detail, accept this view, and estimates or arbitrary percentages for overhead charges will in no case be accepted where, as here, the actual facts and figures as to such matters are available.

Valuation—'Cost-of-Reproducing-New-Less Depreciation'—Actualities vs. Estimates.—Earlier Rate Cases Distinguished.—In the rate cases where the Commission based its determination to a considerable degree upon the estimated cost to reproduce the plant new, deducting depreciation, the actual cost of the existing property was not known to the Commission, and, in order to get some idea of its value, the cost-to-reproduce-less-depreciation was used as one factor, but not the only factor. There was no intention of holding in any case that estimates should be substituted for the actual facts when the latter are ascertainable, and if the percentages somewhat arbitrarily fixed in estimating overhead charges do not agree with actualities, they must be changed, rather than that actualities should be pruned or inflated to agree with speculative estimates.

Valuation—Amount Actually Expended—Percentages for Profit and Superintendence upon Figures Already Containing Such Elements.—Included in the applicant's figures of \$1,072,000 for 'actual cost' of new construction to be capitalized were items of \$38,000 for engineering and superintendence, \$40,000 for obtaining franchises, and other considerable sums for legal expenses, promotion, and the like. HELD,—that no applicant can properly expect the Commission to include such items in net cost and then proceed to add certain arbitrary percentages or estimated allowances to cover the very items for which the actual disbursements had already been included.

Valuation—Amount Actually Expended—Vouchers as Basis of Computing Cost of New Construction.—Actual cost of the new construction as shown by the actual vouchers should be the basis of action in this case, subject naturally to any evidence which may throw doubt upon the propriety of any item or may indicate the omission of any item.

Issuance of Stock and Bonds—Capitalization of 'Good Words, Verbal Recommendations, and Visits of Stockholders.'—In the category of items to be capitalized but for which no vouchers were presented, the applicant mentioned the names of several persons who had spoken well of the undertaking, looked over the proposed line, or advised their friends to invest. In no instance had any bill been rendered, anything actually paid for these services, or any written report thereof filed, and the corporation recognized no indebtedness or obligation therefor. HELD,—that these purported 'services' are not entitled to be included as a basis of capitalization, for it hardly seems reasonable to authorize the capitalization of good words, verbal commendations, and the visits of stockholders.

Valuation—'Cost-of-Reproducing-New'—Physical Property—Interest during Construction as Basis of Capitalization Period and Rate Allowed.—The N. Y. and N. S. T. Co. asked approval of the issuance of approximately \$89,700 of securities to

represent interest, computed at the rate of six (6) per cent on the construction cost, from the date of each voucher to May 31, 1911. The date named was nearly six months after the last section of track had been opened to public use. HELD,—that the rate is reasonable, but that 'actual cost' must be used at the base and not that amount plus the arbitrary percentages already considered, and unless there is some special reason in a particular case, interest to the date named should not be charged to capital account.

Valuation—'Cost-of-Reproducing-New'—Interest During Construction—Deduction of Interest on Deposits with Local Authorities.—In determining the amount of interest during construction which may properly be capitalized, interest must be computed on the deposits made by the company with the local authorities during construction, the interest received upon such deposits deducted from six (6) per cent thereon, and the remainder authorized as a basis of capitalization.

Valuation—'Cost-of-Reproducing-New'—Physical Property—Operating Expenses during Alleged 'Experimental Period.'—The applicant contended that, although its entire system was put in full operation on December 1, 1910, operating expenses for several months thereafter should be authorized to be paid out of capital, upon the ground that the operation during that period was only experimental. HELD,—that the capitalization of operating charges, after the road has been opened for public use and the construction period ended, cannot be defended, and that the proper solution is to charge all current expenses incurred after the beginning of public operation to income account, and later, when the receipts will permit, to distribute a sufficient amount in dividends to equal a fair return not merely for the current years but also for the earlier years when profits were lacking.

Issuance of Stock and Bonds—Amount of Bonds Issuable—Sufficiency of Earnings to Meet Interest Charges.—The N. Y. and N. S. T. Co. asked that an issue of \$1,500,000, par value, of bonds be authorized, at a discount of fifteen (15) per cent, to net \$1,275,000. It appeared: (1) That the annual interest charge on that amount of the bonds would be \$75,000; (2) that the estimate of earnings, submitted by the applicant for the year ending June 30, 1912, fell considerably below that interest figure, even omitting all provision for depreciation and amortization of discounts upon bonds, and (3) that the applicant's estimates for the year 1912-13 show a surplus of only \$5,000 in excess of that interest figure after deducting less than one (1) per cent of the investment, or five (5) per cent of the earnings, for depreciation, and without any provision for the amortization of discounts. HELD,—that, wholly aside from the question of the propriety of allowing bonds to be issued to the amount of \$1,500,000 upon property costing about \$1,600,000, the state of the income account, actual and estimated, shows that to approve an issue of such magnitude, would be to invite foreclosure and reorganization, for the principle that should be applied is clearly that the charges for interest and amortization of discounts upon the bonds authorized should not exceed the amount that will certainly have been earned promptly and regularly, after deducting all charges, including reserve for depreciation, and the like, and, under the application of this rule to the facts surrounding the present application, an issue in excess of \$800,000, par value, of five (5) per cent bonds could not be warranted.

Issuance of Stock and Bonds—Relation of Stock to Bonds—Computation of Amount of Stock Properly to be Authorized.—Of the \$800,000, par value, of bonds of the N. Y. and N. S. T. Co., authorized by the Commission, \$350,000, par value, were to be issued to retire the same amount of bonds outstanding under a former mortgage, leaving \$450,000, par value, of bonds to be issued partly to represent the line recently completed. On the assumption that the original issue of bonds represented a cash value of property to the extent of eighty-five (85) per cent of par, the investment

back of the original bonds would be \$297,500. The new bonds, representing new lines having a greater earning capacity than the old, would, if sold separately, doubtless demand a higher market price than the old bonds, probably ninety (90) per cent of par or more, or at least \$405,000, making a total past and present investment of \$702,500 represented by bonds. HELD,—that to determine the amount of stock which may be issued on account of the new construction, this amount of \$702,500 should be subtracted from the total 'actual cost' as shown by the vouchers, leaving an item of \$897,500, plus \$10,000 to be authorized at present for working capital, or \$907,500 in all, which may be represented by the issuance of stock at par.

Issuance of Stock and Bonds—Request for Leave to Issue Stock for Working Capital.—The applicant requested permission to issue \$150,000, par value, of its stock for working capital. It appeared that the company already had supplies and materials in cash amounting to over \$43,000 which were included in the vouchers already permitted to be capitalized. Aside from the need for a supply of coal during the winter months, no basis was established of need for further working capital. HELD,—that issuance of stock for \$10,000 of working capital will be authorized at this time, and the remainder will be required to await further proof.

Accounts—Amortization of Discounts on Sale of Bonds—Rate of Payment into Fund.—The discount upon the proposed issue of five (5) per cent bonds maturing in 1952 was to amount to \$97,500. HELD,—that the applicant would be required to amortize this sum before the maturing of the bonds, and that, upon a four (4) per cent compound interest basis, the annual payment into the amortization account should be \$1,080, plus interest upon all preceding payments.

Accounts—Amortization of Payments for Franchise Rights and Cost of Acquiring Franchise.—It appeared that the applicant, as required by the City of New York, has paid to the City \$12,000 for certain franchise rights having a duration of 50 years. HELD,—that these payments should be amortized within the term of the grant, and that the same principle should be applied to the expenses incurred by the company in connection with the acquisition of the franchise, and also to the cost of property in the streets covered by the franchises of the City of New York which contain provisions that at the expiration of the franchise such property shall revert to the City without cost.

Accounts—Charging off of Discounts and Tax on Issue of Bonds About to be Retired.—Upon the application of the N. Y. and N. S. T. Co. for approval of an issue of bonds to be used in part to retire an original issue, it appeared: (1) That the discount, tax and other expenses in connection with the first issue of \$350,000 of bonds about to be retired amounted to \$5,162.50; (2) that a certain quantity of cable, originally charged to the transmission line, had been subsequently sold at \$6,500 less than cost, and (3) that of the assets represented by the original issue of \$33,000 of stock, at least \$18,000 had been lost through the failure of the company to build its road within the time allowed. HELD,—that these three items, aggregating \$30,000, should be charged off to profit and loss, at the rate of \$3,000 a year.

Hearings closed January 16, 1912. Opinion adopted February 13, 1912.

The New York and North Shore Traction Company made application to the Commission for the authorization and approval of certain proposed stock and bond issues and of a proposed mortgage. The company asked leave to execute a first mortgage of \$3,000,000 to replace an existing first mortgage of \$1,000,000, and authority to issue bonds to the extent of \$1,500,000 and additional capital stock to the extent of \$771,764.12.

The action of the Commission, in pursuance of the Opinion, approved an issue of \$800,000 in bonds and \$907,500 in stock.

The Order entered in pursuance of the Opinion adopted will be found, hereinafter in this volume, in connection with the rehearing subsequently granted in Case No. 1398.

The further facts in relation to the application appear in the Opinion adopted.

Arthur DuBois, for the Commission.

Bassett, Thompson and Gilpatrick, by *Edward M. Bassett*, for the New York and North Shore Traction Company.

MALTBIE, Commissioner: The applicant in this case is a railroad corporation incorporated on August 6, 1902, under the name of The Mineola, Roslyn & Port Washington Traction Company, for the purpose of constructing a street surface railroad between points in Mineola and Port Washington, in Nassau County. The length of its route was about ten miles, and its authorized capital stock \$150,000. By an order of the Board of Railroad Commissioners, dated February 26, 1903, the company secured a certificate of convenience and a necessity authorizing the construction of its charter route. It appears that the company secured certain franchises from the local authorities, and certain consents of property owners; but through failure to carry out its project within the time specified, these original franchises lapsed.

By an order of the Supreme Court of Nassau County, dated July 22, 1907, the company was authorized to change its name and assume, after August 26th of that year, the name of "The New York & North Shore Traction Company," its present designation, and usually called the traction company for convenience in this opinion.

The company's road as now constructed consists of:—

- (1) Original Line, extending from Mineola through Roslyn to Port Washington, often called the Mineola line;
- (2) Hicksville Division, extending from Mineola to Hicksville;
- (3) Flushing Division, extending from Roslyn to Flushing; and
- (4) Whitestone Branch, extending from Flushing to Whitestone.

FRANCHISES AND CONSENTS.

The entire route seems to be covered by valid franchises and consents which extend beyond the term of the mortgage.

The Mineola line consists of a single track road, 9.69 miles in length, constructed under fifty-year franchises granted by the Board of Supervisors of Nassau County, April 1, 1907, and by the Highway Commissioners of the town of North Hempstead, March 19, 1907.

The Hicksville division is also a single track line, 6.5 miles in length, constructed under a certificate of extension filed in the Secretary of State's office March 3, 1908, and a series of 99-year franchises granted in 1908 by the Board of Supervisors of Nassau County, the Highway Commissioners and Town Boards of the towns of North Hempstead and Oyster Bay and approved by the Public Service Commission for the Second District by certificates issued September 24, 1908, and March 30, 1909.

The Flushing division and the Whitestone branch were constructed under certificates of extension filed in the office of the Secretary of State, January 18, 1908, and March 29, 1909, and certain franchises granted by the Board of Supervisors of Nassau County, the Town Board and Highway Commissioners of the town of North Hempstead and the City of New York. The franchises for the portion of this division outside of the limits of the City of New York, extending from Roslyn to Little Neck, run for a period of fifty years from February 1, 1908, while the portion of the line within the city limits is covered by two city franchises, dated February 1, 1909, and

April 14, 1909, and running for a 25-year period ending February 1, 1934, with the right of renewal for a further period of twenty-five years upon a fair revaluation of the grants. Certificates of approval of the exercise of the franchises from the city were issued by this Commission on June 15, 1909, and a certificate of approval for the exercise of the franchises in North Hempstead was issued by the Second District Commission on April 30, 1909. The entire length of the Flushing division, including the Whitestone branch, is about 13 miles, with about 21 miles of single track. Within the city limits this division is for the most part a double track line.

On all three divisions the road runs at certain points over private property, but the company apparently has secured by purchase or otherwise adequate rights for construction and operation covering its entire route. The Flushing division, as originally described in the company's certificate of extension and its first city franchise, included a branch on Broadway, Bayside, extending from Tenth avenue to Bell avenue. This branch was designed to connect with an extension of the New York & Queens County Railway, then contemplated. The abandonment of the latter having rendered this company's Broadway extension undesirable, the company secured from the City of New York under date of June 27, 1911, a modification of its franchise contract authorizing it to abandon this portion of its route. As one of the conditions of the modified contract, the city required the company to agree to institute formal abandonment proceedings before this Commission within twelve months from June 27, 1911. This contemplated action has not yet been taken, but the company has indicated its intention to comply with the terms of its city contract within the time limit fixed.

FINANCIAL RÉSUMÉ.

The Mineola, Roslyn and Port Washington Traction Company, between the date of its incorporation in 1902 and September, 1903, issued capital stock to the amount of \$33,000 (par value) in payment of expenses incurred for organization, promotion, securing consents and franchises, etc., no details being of record. For various reasons the company did not construct its road. The outstanding stock, except \$5,000, passed into the possession of the present holders at various prices, the aggregate amount paid being \$8,000.

On May 7, 1907, the authorized issue of stock was increased from \$150,000 to \$1,250,000 par value, consisting of 25,000 shares of \$50 each, which increase received the approval of the State Board of Railroad Commissioners on June 26, 1907. On the same day the board approved a mortgage on the company's property and franchises for \$1,000,000 to secure that amount of 5 per cent first mortgage bonds, maturing September 1, 1947, the issue of which was authorized by the stockholders on May 14, 1907.

Construction of the line from Mineola to Port Washington was begun in May, 1907, and was principally performed under contract with the Cleveland Construction Company on the basis of cost plus 10 per cent to cover various items. The New York and Nassau County Railway Syndicate, composed of the persons controlling the traction company, advanced funds to the Cleveland Construction Company as construction progressed. In turn they received from the traction company—their *alter ego*—\$117,000 par value of capital stock and \$350,000 par value of first mortgage bonds. These securities were subsequently transferred by the construction company to George A. Stanley and James A. MacElhinny, as trustees.

The Hicksville and Flushing divisions and Whitestone branch were built under a contract between the traction company and the New York and Nassau Construction Company, a corporation organized under the laws of New Jersey and composed of the same individuals who controlled the traction company. The New York and Nassau County Railway Syndicate, composed of the same persons, again advanced the funds to the construction company. On May 31, 1911, the traction company issued 6 per cent notes to this construction company for the following amounts to

that date:—Construction expenditures, \$1,224,612.42; for interest on construction expenditures, \$89,699.28; for engineering and superintendence, promotion fees and legal services and expenses, \$275,537.79; a total of \$1,589,849.49. These notes were subsequently endorsed and transferred to George A. Stanley and James A. MacElhinny as trustees. As a result of these various operations, it came about that upon May 31, 1911, certain persons acting through Messrs. Stanley and MacElhinny as trustees owned jointly all of the stock of the New York and North Shore Traction Company, except a few shares having a par value of \$5,000, all of the bonds outstanding and all of the notes.

The company's balance sheet, corrected and revised for June 30, 1911, the end of the fiscal year, was as follows:—

THE NEW YORK AND NORTH SHORE TRACTION COMPANY.

BALANCE SHEET, JUNE 30, 1911.

ASSETS.

(1) Fixed capital as of December 31, 1908.	\$500,000.00
(2) Fixed capital installed since December 31, 1908.	1,570,975.01
(3) Materials and supplies.	30,689.23
(4) Cash.	13,152.11
(5) Accounts receivable.	4,600.00
(6) Prepaid taxes and insurance.	963.00
Total.	<u>\$2,120,379.35</u>

LIABILITIES.

(1) First mortgage 5 per cent bonds, due Sept. 1, 1947	\$350,000.00
(2) Common stock.	150,000.00
(3) Bills payable.	1,589,849.49
(4) Accounts payable.	5,339.14
(5) Taxes accrued.	7,671.18
(6) Interest accrued (1 mo. on bills payable).	7,949.25
(7) Due for wages.	3,127.80
(8) Other suspense.	500.00
(9) Corporate surplus.	5,942.49
Total.	<u>\$2,120,379.35</u>

From the above, it will be seen that the expenditures since December 31, 1908, for fixed capital and materials and supplies exceeded the notes of May 31, 1911, by \$11,814.75. This amount represents expenditures made directly by the traction company for road and equipment. It is also evident that item (1) of assets is a balancing entry for items (1) and (2) of liabilities, and that items (2) and (3) of assets are balancing entries for item (3) of liabilities plus the amount just stated. It is further apparent that the company had accumulated miscellaneous assets, excluding the amount spent directly on road and equipment and materials and supplies totalling \$18,715.11. Against this there were outstanding current liabilities aggregating \$24,587.37, an excess of liabilities of \$5,872.26. If this amount is deducted from the above figure of \$11,814.75, the balance of \$5,942.49 must have come from the operation of the road, and this is verified by the income account.

INCOME ACCOUNT.

	Nov. 18, 1907 to June 30, 1908.	YEARS ENDING		
		June 30, 1909.	June 30, 1910.	June 30, 1911.
	\$ cts.	\$ cts.	\$ cts.	\$ cts.
Operating revenue	12,527 07	37,083 88	51,261 75	125,763 95
Operating expenses	16,667 13	34,757 53	52,715 70	86,184 66
Operating income or (D) loss	(D) 4,140 06	2,326 35	(D) 1,453 95	39,584 29
Deduct—				
Taxes.....		504 30	7,792 83	11,015 96
Interest one month only.....				7,949 25
Rent.....				150 00
Adjustments.....		2,961 80		
Net corporate income or (D) loss.....	(D) 4,140 06	(D) 1,139 75	(D) 9,246 78	20,469 03
Miles of revenue track operated at close of year.....	9.63	16.86	18.59	37.60

During the period covered, no dividends were declared, and the interest on the outstanding bonds was neither paid nor charged upon the books of the company with the exception of the amount for one month. It is obvious that it could not have been paid, as the net balance upon June 30, 1911, was only \$5,942.49, omitting depreciation, amortization of discounts, other reserve payments and interest except for one month.

SCOPE OF APPLICATION.

The company asks permission to perform several distinct acts:—

1. To make and deliver a first mortgage of \$3,000,000 to replace the existing first mortgage of \$1,000,000.

2. To issue bonds having a face value of \$1,500,000 under said mortgage, said bonds to be used as follows:

A. \$350,000 to refund bonds for that amount now outstanding under the \$1,000,000 mortgage.

B. \$1,150,000 to be issued to Messrs. MacElhinny and Stanley at a 15 per cent. discount (net \$977,500) in part payment of the notes held by them.

3. To issue additional capital stock having a par value of \$771,764.12 to be used as follows:

A. \$612,349.49 of such stock to be issued to Messrs. MacElhinny and Stanley in part payment of the notes held by them.

B. \$9,414.63 of such stock to be issued to reimburse income for expenditures made therefrom for road and equipment.

C. \$150,000 of such stock for working capital.

All of the bonds and the major portion of the capital stock would be exchanged for the notes, and the holders thereof offer to waive all interest that might be claimed to May 31, 1911. The remainder of the stock—\$159,414.63—would be sold for cash.

If the bonds issued under the existing mortgage are ever to be refunded, and if the notes are to be paid, conditions will doubtless never be more favorable. But before approval may be given, it is incumbent upon the Commission to inquire into the

purposes for which they were issued originally and to ascertain the extent to which they are represented by property, particularly in view of the community of interest between the construction companies and the traction company—the applicant in this case. With this duty in mind, an exhaustive examination has been made of the records of the company, which has freely and willingly afforded every facility to the experts of the Commission. The vouchers of the construction companies have been produced, and the case has been progressed by the frank and clear manner in which all matters have been treated by the counsel and officers of the company. The amounts are not large, but the case involves several important questions of wide application.

COST OF MINEOLA LINE.

The company produced at the request of the Commission all of the vouchers rendered for the Mineola division—the first line to be constructed and operated. They were checked by our accountants and show a total expenditure of \$334,567.47, classified as follows:—

COST VOUCHERS FOR MINEOLA DIVISION.

Net cost of physical property other than land (a)	\$278,492 71
Construction company's charges	26,561 35
Engineering	2,776 49
Administration, contingencies, damages and incidentals	5,108 63
Land	6,690 00
Franchises, consents, etc.	3,482 86
Organization of company	2,794 40
Expense of stock and bond issues (b)	3,525 00
Legal expenses	5,116 01
Interest during construction	7 52
Taxes during construction	12 50
Total	\$334,567 47

Certain items of expense are not included in the above statement. The services of two persons were not charged and compensated in voucher form. Some engineering work and advice seem to have been omitted. Probably \$10,000 would amply cover these items and any others of a similar character that may have been omitted.

It is evident that the small sum of \$7.52 does not begin to cover the amount of interest that actually accrued prior to the beginning of operation. The persons to whom the securities were issued took their payment in this form without rendering vouchers, but in considering the amount of stock and bonds that may reasonably be issued, it is necessary to determine what may properly be added to the voucher cost for unvouchered interest.

Construction was begun in May, 1907, and the first section—nearly one-half of the entire mileage—was operated for the first time upon November 18, 1907. A small addition was opened December 7, and upon the first of the following February practically the entire line was in operation. A small extension of three-tenths of a mile was added about a month later.

The construction period ends when public operation begins, and thereafter it is not proper to charge interest upon cost to capital account. However, it is not practicable in this case to differentiate the cost items for the various sections and to apply this principle. It is considered fair under the circumstances to adopt February 1,

(a) About 20 per cent of this item was for work done by sub-contractors and doubtless includes a margin for profit, engineering, superintendence, legal expenses, etc.

(b) Engraving stocks and bonds, mortgage tax and fees.

1908, as the date upon which the construction period ends for this line and up to which interest may be charged to capital.

In computing this amount, it may be assumed that a company would be required to have on hand at the beginning of the month a sum of money sufficient to pay all bills becoming due during that month. In other words, interest should not be computed from the date of payment as shown by the voucher to February 1, 1908, but from the first of the month in which such payment was made. Six per cent. is considered the fair rate of interest, and as the period of construction is less than nine months, the question of compounding does not arise. Allowing also for a reasonable cash balance to be kept in bank from month to month, it is found that \$7,500 would certainly be sufficient to cover "interest during construction."

Combining the various factors, it is found that *upon February 1, 1908, the Mineola line represented an investment fairly estimated at from \$350,000 to \$355,000.* The line was capitalized by the issue of stock having a par value of \$117,000 and bonds to the amount of \$350,000—a total of \$467,000. If it be assumed that the stock represented value, par for par, as required by law, the bonds would represent property costing about \$235,000.

Now, if the interest upon the total investment to May 31, 1911, were to be added to this amount, and bonds were to be considered as issued at 80, the par value of such issue would be practically \$350,000. But, in order to reach this result, the Commission must hold that it is proper to pay interest accruing during three years of operation out of capital. Probably the Commission has no power to authorize this to be done; and if it had the power, it ought not to do so. *After the construction period has passed, interest should be paid out of earnings; and if there is not a positive prospect that the undertaking will earn a sufficient amount after paying all other charges to meet interest on bonds when due, bonds should not be issued.* If an enterprise has an uncertain future, and the prospect of earning more than expenses is indefinite, it should be financed by stock and the stockholders should take the risk. The existence of a corporation ought not to be constantly jeopardized by the fear of foreclosure due to failure to earn in any quarter or half-year the interest on the bonds. Under such circumstances, the manager will be tempted to neglect maintenance, to omit provision for depreciation and ultimate replacement of worn-out equipment and plant, and to skimp the service rendered to the public.

These principles are recognized by all financial houses of high standing.* They also require a considerable margin of safety, so that in case of panic or business depression, reorganization may not be necessary. Not infrequently mortgages provide that bonds may not be issued until for a certain period earnings have considerably exceeded fixed charges, including interest on the new bonds. The record reveals the fact that the income account did not show a surplus over all operating charges until 1911, and that even yet the company is unable to pay the interest which has accrued. Furthermore, if it were not for the Flushing division and the New York City business, the showing would be much more unfavorable. It is evident that first mortgage bonds with foreclosure privileges ought not to have been issued to the amount of \$350,000 upon the original line from Mineola to Roslyn.

NEW CONSTRUCTION CONTRACT.

The other lines of the system were constructed and financed under a different arrangement from the one just considered. Under date of October 10, 1908, a contract was entered into by the traction company and the New York & Nassau Construction Company—commonly called the construction company. As already stated, the former was organized under the laws of the State of New York and the latter under those of New Jersey, but both were controlled by the same persons having the same interests.

* Cf. evidence of Mr. Watkins quoted later.

According to the terms of this contract, the construction company agreed to secure the necessary property, franchises and permits, and to construct the Hicksville, Flushing and Whitestone extensions, together with the necessary power station, sub-station, car barn, office building, transmission lines, rolling stock, etc. The character of the track, rolling stock, buildings, etc., was only very generally described in the contract. Apparently the construction company was free to build almost any kind of system as long as the 'construction, installation and operation described, contemplated or done under this agreement' should be to the satisfaction of one person, who was the president of the traction company. This is important in view of other provisions in the contract, which provide for compensation upon the basis of cost plus certain percentages.

The traction company agreed to pay the construction company 'the actual cash cost,' including law expenditures, taxes and damages for which the traction company might be liable in connection with the three extensions. In addition to the actual cash cost, the traction company agreed to pay:—

(a) 10 per cent upon labor and services and 15 per cent upon materials and property.

The actual cash cost plus these percentages which, for lack of a better term, may be called contractor's profit, was to constitute a new base, at least the contract was so construed in practice by parties interested. Upon this amount there were to be computed the following percentages which were also to be paid:—

(b) 10 per cent for engineering and superintendence.

(c) $7\frac{1}{2}$ per cent for 'services in obtaining franchises and other rights, interesting investors in the enterprise, temporary financing and other necessary promotion and financing in connection with this agreement.'

(d) 5 per cent for the necessary legal services and expenses required in carrying out the purposes of this agreement.'

The total of these overhead charges ranges from $33\frac{1}{2}$ to 39 per cent of the actual cost, but, as only a small portion of the work was done directly by the construction company, the overhead charges amounted in practice to 50 per cent of the total cost less the work done by sub-contractors. In addition to all of these charges, the contract provided that the construction company should render bills monthly, including the foregoing percentages, and that interest should be computed from the date the bill was rendered at the rate of 6 per cent per annum.

BASIS OF CHARGES ANALYZED.

According to the terms of this agreement the construction company charged the traction company the following amounts, and upon May 31, 1911, received the notes previously referred to (the items 'a' to 'd' refer to the above divisions having the same designation):—

Actual net cost..	\$1,072,239 53
a—Contractor's profit..	152,372 89
b—Engineering and superintendence..	122,461 24
c—Securing franchises and promotion..	91,845 93
d—Legal expenses..	61,230 62
Interest during construction..	89,699 28
Total..	<u>\$1,589,849 49</u>

As the applicants rely principally upon this statement to justify the issuance of the securities requested in the petition, it is important to note how the items are computed. The contractor's profit is computed not only upon the work which the construction company actually performed but also upon all sub-contracts, land purchased,

organization expenses, franchise payments, etc., notwithstanding the fact that separate and additional charges were also made for legal expenses and securing of franchises. Sub-contractors were paid over \$345,000; cars, equipment and materials in bulk cost nearly \$470,000; and the cost of labor performed under the direct supervision of the contractor was only \$91,000 out of a total of \$1,072,000.

In like manner 10 per cent for engineering and superintendence was computed on sub-contracts, although the sub-contractors turned over completed work to the company and naturally included in their charges not merely the bare cost but a sufficient amount to cover *all* overhead charges of every description. Engineering was also charged upon organization expenses, franchise payments to the city, and the salaries and expenses of the engineers actually employed. Under the head of 'actual cost' in the appended statement, there have been included vouchers for engineering, superintendence, etc., amounting to nearly \$38,000, upon which and in addition to which the construction company has charged 10 per cent. It hardly seems possible that a company can expect to charge the amounts paid for engineering and superintendence and also to be paid a 10 per cent commission besides for the same things.

This system of compounding was followed under other headings. The percentage for obtaining franchises and rights, promotion, etc., was computed on and added to about \$98,000 actually paid for franchises, consents, easements, land, etc. The percentage for legal expenses was computed on and added to actual payments for legal services. Both were figured on salaries and expenses for engineers, taxes during construction and other similar charges.

While the hearings were in progress, the applicants modified their claims upon these points and said that many items should be withdrawn. It is suggested that 'actual cost' did not include all that the construction company had expended. An examination of the records of the construction company and of the syndicate was made by the accountants of the Commission, and it was found that in addition to the actual cost given in the preceding tabulation, \$109,621.16 had been expended. It was also claimed that certain persons had given their services without charge, and that additional interest was actually paid but not booked. Leaving these for later consideration, the total amount of money actually paid out by the construction company and the syndicate was \$1,188,775.32, classified as follows:—

TOTAL COST OF NEW CONSTRUCTION.

(Hicksville and Flushing Divisions and Whitestone Branch.)

	Not Vouchered.	Total Cost.
	\$ cts.	\$ cts.
Net cost of physical property other than land (a).....		930,074 46
Engineering.....	13,670 43	23,663 10
Administration, contingencies, damages and incidentals (b).....	8,561 84	36,206 62
Land.....		58,360 86
Franchises, consents etc. (c).....	74 82	40,095 19
Expenses of financial syndicate.....	9,808 97	10,140 83
Expense of stock and bond issues.....		2,262 50
Adjustment of plant—experimental operation.....		3,118 96
Interest during construction.....	19,733 33	19,733 33
Taxes during construction.....		7,347 75
Miscellaneous—distribution in doubt.....	57,771 72	57,771 72
	109,621 16	1,188,775 32

(a) Nearly 40 per cent of this item represents work done by sub-contract and doubtless includes a margin for profit, engineering, superintendence, legal expenses, etc.

(b) This item includes \$11,084.91 for removal and relocation of poles and lines.

(c) Including not only cash payments to New York City, but all expenses connected therewith and city bonds on deposit which will be returned, costing \$13,791.74.

Omitting interest entirely, it is seen that all actual disbursements totalled \$1,169,041.99, including the actual payments for engineering, superintendence, large legal fees (see miscellaneous), franchise payments and expenses, syndicate expenses, etc. The applicants ask that the Commission approve the issuance of securities on the basis of \$1,500,150.21—or \$330,000 in excess of actual payments. If this request is to be sanctioned and actual cost abandoned as a guide, the reasons must be great and overpowering.

PURPOSE OF CONSTRUCTION CONTRACT.

One reason that has been suggested is that the construction contract provides for the addition of certain percentages. Let us examine this contract and see between whom it was made and for what purposes. The two parties were the construction company and the traction company, nominally distinct corporations but actually controlled by the same persons. Hence, the contract is not an agreement between separate and distinct persons or corporations; nor is it an expression of the free play of open competition, but a document signed by persons acting one moment in one capacity and the next in another.

It is evident that the percentages for overhead charges could have been put at any figure. The 'contractor' could have been given 50 per cent instead of 10 per cent. For engineering 40 per cent could have been allowed, and 100 per cent for legal expenses. What the individuals paid as traction company they received back as construction company. Consequently, the terms of the so-called agreement are valueless as an aid to determine what securities may be issued, and counsel for the applicant company admitted that they are not those upon which a willing buyer and a willing seller would agree.

One naturally asks why such a document was signed. Ordinarily, when recourse is had to construction companies it is because they have better facilities for purchasing supplies, can obtain lower prices and have a more expert and competent engineering staff—because the traction company believes the construction company can provide a better and cheaper plant than it could build if it were to do the work directly. But there is no such justification in this case. The construction company here did not exist previously; it had no staff of engineers or organization; it had no favorable connection with supply houses; it had no experience; it had nothing which the traction company itself did not have. The traction company could have done all of the work with equal facility and with the same results. Indeed, it might be argued that the cost would have been less if the traction company had done the work directly, for the expense of might have been saved.

Why, then, was the construction company brought into the situation? Let a witness answer who was called by the applicants—one of the trustees above referred to and an officer in each company. The record reads:—

'By Mr. DuBois:

'Q. There was no way that the contractor could have lost anything on this work? A. Not in this case.* * *

'Commissioner Maltbie: Why did you not do this work directly as the traction company?

'The Witness: Well, for several reasons. In the first place, the people who were in this concern, and who had put their money into it, wanted to have a contract that would give them as much of the securities as they could get out of it. Secondly, when it came down to the question of damages during construction we would rather have the damages fathered on the construction company than on the traction company.

'Commissioner Maltbie. But right on that point, you would have to pay them just the same.

'The Witness: We would have to pay them but we thought we would have a better chance to defend them, because, being a New Jersey corporation, we could move them into the United States Court, where we think the prejudice against corporations is not as strong among jurors as we find it in the local courts here. The third reason was that as a matter of bookkeeping, we were given to understand it would be easier to work out our plans by having a construction company.'

The last mentioned reason may be dismissed. Accounting methods are simpler for direct construction than agency accounts. The second reason has little importance, for the total paid for damages was less than \$1,000. Further, this Commission does not encourage corporations to resort to the federal courts to escape damage claims. The first is the real reason; a contract between two corporations was thought to be a means of securing a larger issue of securities. This is not a valid reason, and the Commission does not recognize it as proper. *Securities must be based upon some solid ground, such as value or cost and not varied with the multiplication of inter-company relations. The Commission does not favor the formation of a construction company by the persons who control the corporation with which such construction company is to do business.*

ACTUAL COST vs. ESTIMATES.

The applicants have argued that if the terms of the so-called agreement are not to be taken as the basis for the approval of securities, the Commission should accept the 'actual cost' as the beginning point and then proceed to add certain arbitrary percentages for contractor's profit, engineering, superintendence, contingencies, legal services, promotion, organization, &c. We are asked to follow the precedent in certain rate cases where the Commission based its determination to a considerable degree upon the estimated cost to reproduce a plant new, deducting depreciation. The Commission does not accept this view for various reasons, the principal ones being the following:

(1) In the rate cases to which reference was made, the actual cost of the existing property was not known to the Commission. Hence, in order to get some idea of its value, the cost-to-reproduce-new-less-depreciation was used as one factor, but not the only factor. In the present case, the actual cost is known.

(2) The estimates made for overhead charges in these cases were invariably liberal, because, lacking definite information, the Commission did not wish to do injustice.

(3) There was no intention or holding in any case that estimates should be substituted for *actual facts* when ascertainable. The percentages somewhat arbitrarily fixed must be justified by facts and experience. If they do not agree with actualities, they must be changed. Actualities are not to be pruned or inflated to agree with estimates.

(4) To follow the suggestion would be to brush facts aside and enter the realm of speculation. The applicants ask that we start with *their* actual cost. But how do we know that a construction company with experience would not have built the road at a lower net cost? If there is economy in a construction contract as compared with direct construction, it arises from this fact, viz., that the cost by the former will be less. The engineers of the Commission were not directed to make a critical survey of the undertaking, but certain features came to our attention which indicated unusual if not unwise methods. For example, ties were spaced two feet from centre to centre; the usual practice which is considered thoroughly good engineering calls for a distance of thirty or thirty-six inches. If a theoretical structure is to be erected as the standard for an issue of securities in this case, the basic figure of net cost must be examined.

(5) In any event, the 'actual cost' of \$1,072,000 cannot be accepted as it already contains \$38,000 for engineering, superintendence, etc., \$40,000 for obtaining franchises, and other considerable amounts for legal expenses, promotion, etc. No company can properly expect the Commission to include such items in net cost and then proceed to add certain percentages to cover the very items that have been included.

The applicants argue that if the Commission does not make generous allowance for overhead charges in addition to actual cost where the company does the work directly, a bad precedent will be established and companies will be encouraged to employ construction companies and do none of the work themselves. It is intimated that such a course will result in higher construction costs, higher rates and less thrifty management. The argument is unsound. If the construction company is entirely distinct and separate from the operating company, if the persons interested in the latter have no connection whatever with the former, and if ordinary common sense is followed in the management of the operating company, it will not make a construction contract unless it honestly believes it will obtain a better plant at a lower cost than if it does its own construction work. If it does make such a contract, it naturally will consult with and obtain offers from several companies, accepting the best. Under such competitive conditions, it is not likely that any such percentages for overhead charges as appeared in the so-called agreement of October 10, 1908, would be accepted, or that the charges would be exorbitant. Further, the contract cost would not exceed direct labor cost, unless a grave error in judgment were made; and rates could not be affected, for the investment would not be larger.

These conclusions are believed to be sound, because self-interest would demand that the cost be kept down in order that no more capital be raised than necessary, that the rate of profit be as large as possible and that the service be such as to attract business. If, however, a majority in interest of the stockholders of the operating company controlled a construction company, it would be to *their* profit to make a contract between the two companies by which the construction company would get a large profit. The minority would suffer, but the majority would profit at the expense of the minority. The wrongs that have resulted from construction contracts have arisen largely from such inter-company or individual relations.

The Commission holds that *actual cost as shown by actual vouchers should be the basis of action in this case*, subject naturally to any evidence that may throw doubt upon the propriety of any item or that may indicate the omission of any item. Vouchers are not conclusive against all other evidence, but they are not to be cast aside without reason.

First as to omitted items. When asked whether any expenditures had been made which were not represented by vouchers, the applicants mentioned the names of several persons who had visited the railroad, commented upon the plans or given advice of a general character. Others were mentioned who had spoken well of the undertaking; others who had furnished money or advised their friends to invest. But in no case was any bill rendered, or anything actually paid for these services, or any written report filed; and the company recognizes no obligation or indebtedness therefor. If those who had no interest in the company did not submit bills and were not paid, it may be assumed that their services were not sufficiently valuable or important to require recognition here. Apparently the others gave the personal attention and inspection that one would naturally give to any enterprise in which he was financially interested. It would be quite unusual if the investors did not visit the road, speak well of it and recommend others to invest. But it hardly seems reasonable to authorize the capitalization of good words, verbal commendations and visits of stockholders. The compensation which they were and are to receive is the return from the operation of the road in the form of interest or dividends.

Upon the other hand, the statement of total cost contains one item—miscellaneous, nearly \$58,000—which is made up principally of payments to one person. Two payments were made in 1909 of \$10,000 and \$30,000, besides a salary at the rate

of \$5,000 per year plus expenses. Part of it may be said to cover services rendered in connection with the Mineola lines, for which allowance has been made. But even deducting this amount, the remainder is large and unusual, and more than counterbalances any omitted expenses connected with the visits of investors which should be charged to capital.

INTEREST DURING CONSTRUCTION.

In the statement of the company, approval is asked for nearly \$89,700, representing interest computed at the rate of 6 per cent from the date of the voucher to May 31, 1911. The rate is reasonable, but actual cost must be used as the base and not that amount plus the arbitrary percentages already considered. May 31, 1911, is nearly six months after the last section of track was opened for public use. Unless there is some special reason, interest to that date should not be charged to capital. In order to determine the reasonable amount so chargeable, the situation must be reviewed.

First, as to the Hicksville division. Upon January 24, 1909, over 90 per cent of this line was in operation but only one-half of the cost had been paid. It would be unfair to apply the rule strictly to this case, and interest may properly be computed up to March 1, 1909. The item is not large, approximately \$3,000.

The Flushing division, including the Whitestone branch, was not opened in its entirety at one time. The first section was opened May 1, 1910, and the last December 4, 1910. Nearly 85 per cent had been put in operation before September 1st, and over 99 per cent before November 1st. The power station with its transmission lines was in operation in August. However, the last piece of track was an important link, being a bridge over a creek. Under all circumstances, it seems reasonable to take November 1st as the date to which to compute interest. Some of the road had been in operation six months and all was in operation a month later. It would be more exact to apportion the cost to the lines as opened, but the records were not kept in such shape that this may be done. Following the principles previously stated and applied to the Mineola division, the interest to November 1st on the total actual cost at 6 per cent per annum would be nearly \$37,500.

In addition, interest must be computed on deposits made with the local authorities during construction. Deducting the interest received upon such deposits by the company from 6 per cent thereon, there remains about \$1,500.

The total amount of interest on this one division properly chargeable to capital would be, therefore, about \$42,000.

CAPITALIZATION OF OPERATING EXPENSES.

The applicants argued that, although the entire system was 'put in full operation, December 1, 1910,' interest and operating expenses for several months thereafter should be paid out of capital upon the ground that the operation was experimental. The testimony of the witness called upon this point shows what little ground there is for such a claim:—

'By Mr. DuBois:

'Q. What is your definition of a tentative and experimental operation of a railroad? A. I would say that the tentative period, in the operation of a railroad was the period in which the company was getting familiar with the number of riders and knowing just what the requirements of its road were in order to give good service.

'Q. Well, what phenomena would mark the end of a tentative and experimental period in the beginning of the regular operation? A. In my opinion there would be no definite line marking the change; it would be rather gradual.

However, there is a point which you reach when you feel that you are operating on a more substantial basis and feel confident that your schedules and so forth, can meet the needs of the community.

* * * * *

'Commissioner Maltbie: Well, from that point of view, do you ever pass the experimental stage?

'The Witness: No, sir, not entirely.

'Commissioner Maltbie: It is constant readjustment of service to changed conditions, is it not?

'The Witness: Yes, sir.

* * * * *

'Commissioner Maltbie: If that is true, then no road ever ceases to pass the experimental stage, does it?

'The Witness: No, sir.'

It is obvious that the capitalization of operating charges, after the road has been opened for public use and the construction period ended, cannot be defended. Schedules must be changed constantly, and cars must be routed differently from season to season and from year to year. No sooner has the service been adjusted to certain conditions than the conditions change and service must again be readjusted. Experimentation must go on continually.

The method suggested is dangerous, as it opens the door to over-capitalization. Who is to decide when the company shall cease to charge operating expenses to capital, and how is it to be determined? If it may go on for six months as requested in this case, why not for a year; why not until the road has reached its maximum capacity? If operating charges may be capitalized, why not unearned dividends and why not pay dividends by issuing securities? Fortunately, the law does not permit such things to be done. It is evident that when one has embarked upon this sea, he is soon sailing without a compass.

The proper solution is to charge all current expenses incurred after public operation begins to income account and later, when receipts will permit, to distribute a sufficient amount in dividends to equal a fair return not merely for the current years but for the early years when profits were lacking.

DEVELOPMENT.

In the vouchers already considered as representing the actual cost of the Hicksville, Flushing and Whitestone lines, there was included about \$3,000 as a development expense, representing the cost of adjusting the power plant. The applicants claim that certain other expenses should likewise be transferred to this heading. It is impossible to say what the exact amount should be, as the records have not been kept in a manner which will permit accurate segregation. It is believed, however, that a fair estimate would be \$3,000. This being allowed, the books must be altered accordingly.

SUMMARY OF COST.

Combining all of the various elements already considered, we reach the following summary:—

Original issue of stock.. . . .	\$ 33,000
Mineola line.. . . .	352,000
Hicksville, Flushing and Whitestone lines.. . . .	1,211,000
Miscellaneous items.. . . .	3,000
<hr/>	
Total construction cost.. . . .	\$1,599,000
Say.. . . .	1,600,000

It is possible that in the apportionment of costs and in the distribution of certain items upon the books of the company, certain charges have been made to one division that ought to have been made to another. As the total would not be altered if the corrections were made, they are omitted from consideration here.

RELATION OF BONDS TO STOCK.

Having determined the basis of cost or real investment, the question arises, to what extent may bonds be issued? The company asks that a par value of \$1,500,000 be authorized at a discount of 15 per cent, net \$1,275,000. If the request be granted, the annual interest charge would be \$75,000. Wholly aside from the propriety of allowing bonds to be issued to the amount of \$1,500,000 upon property costing about \$1,600,000, the income account shows that at no time have the earnings been sufficient to pay any such sum. Even the estimate of earnings submitted by the applicants for the year ending June 30, 1912, falls considerably below the necessary amount, omitting all provision for depreciation and amortization of discounts upon bonds. The estimates for the year 1912-13 show a surplus of only \$5,000 in excess of interest, after deducting less than 1 per cent of the investment, or 5 per cent of earnings, for depreciation, and without any provision for the amortization of discounts, etc. In order to reach even these unfavorable results, the applicants had to estimate an annual increase of 50 per cent in revenue for the years 1912 and 1913, as shown by the table on page 87, *post*.

It is quite apparent that the Commission ought not to approve an issue of such magnitude. To do so would be to invite foreclosure and reorganization. The principle that should be applied is clearly that the charges for interest and amortization of discounts upon the bonds authorized should not exceed the amount that will certainly be earned promptly and regularly, after deducting all charges, including reserves for depreciation, etc. It is quite customary for bond houses of standing to go further and require a considerable margin of safety. The evidence of a witness—Mr. Watkins—called by the applicants is in agreement with this statement. It is as follows:—

‘By Commissioner Maltbie:

‘Q. Would you handle any bonds of any company at any price, that you thought might go into a receiver’s hands within a year? A. No, sir. * * * I would not handle them at all.

‘Q. And in your mind would it be a reasonable attitude to take that the bond issue should not be so large but that the interest on that issue would be reasonably certain to be met when it came due? A. Yes, sir; it should be.

‘Q. And is it not a generally recognized principle in bond houses, where they are fixing the amount of bonds and determining whether they will take an issue or not, to apply the principle that the amount of bonds should not be beyond the amount where there is a quite definite and reasonably sure prospect of earning the interest on that issue. A. Yes, sir. * * *

INCOME ACCOUNT—1908 TO 1919.

(Estimated except for the years from 1908 to 1911.)

Year ending June 30	Revenue.	Operating Expenses and Taxes.*	Depreciation.*	Net Income.	Mileage.
	\$ cts.	\$ cts.	\$ cts.	\$ cts.	
1908**	12,527 07	16,667 15	(D) 4,140 06		9 63
1909	37,083 88	38,223 63	(D) 1,139 75		16 86
1910	51,261 75	60,508 53	(D) 9,246 78		18 59
1911	125,768 95	105,299 87		20,469 08	37 60
1912	189,184 05	129,444 11		59,739 94	37 60
1913	283,776 08	189,091 17	14,200 00	80,484 91	37 60
1914	309,315 00	205,025 00	15,450 00	88,840 00	37 60
1915	337,153 00	222,634 00	16,850 00	97,669 00	37 60
1916	367,500 00	241,750 00	18,375 00	107,375 00	37 60
1917	400,575 00	262,600 00	20,028 00	117,947 00	37 60
1918	436,625 00	285,257 00	21,830 00	129,538 00	37 60
1919	475,900 00	309,900 00	23,800 00	142,200 00	37 60

* Including in each of the years 1911, 1912 and 1913, \$150 representing an income deduction.

**From November 18, 1907 to June 30, 1908.

As the first interest payment upon these bonds will be due upon September 1, 1912, it is necessary to consider the earnings for the year 1912-13. It is reasonably certain that the receipts for that year will exceed considerably those for 1911-12. According to the estimate of the company, the net earnings, after paying taxes, will be about \$95,000. Deducting \$30,000 for depreciation and \$10,000 for amortization the net income would be \$55,000. This amount seems excessive, as it is based upon a 50 per cent increase in traffic over the preceding year. Assuming, however, that the net income will be less than \$50,000, an issue in excess of \$800,000 of 5 per cent bonds would not be warranted.

Of this issue \$350,000, par value, are to be used to retire the same amount of bonds now outstanding under the old mortgage, which would leave \$450,000, par value, of bonds to be issued partly to represent the lines recently completed. Assuming that the original issue of bonds represented a cash value of property to the extent of 85 per cent of par, the investment back of these bonds would be \$297,500, the new bonds representing new lines having a greater earning capacity than the old would, if sold separately, command a higher market price, probably 90 per cent of par or more. Upon this basis, bonds having a par value of \$450,000 would represent an investment of at least \$405,000, making a total past and present investment of \$702,500. Subtracting this amount from the total construction cost, there remains an item of \$897,500, which may be represented by stock at par.

The applicants have requested permission to issue stock of a par value of \$150,000 for working capital. No basis was established for such an amount. The company already has supplies, materials and cash amounting to over \$43,000 which were included in the vouchers previously considered. Need was shown for a considerable supply of coal during the winter months, but \$5,000 will cover this item. A further sum of \$5,000 will be authorized, but the remainder will await further proof.

ITEMS TO BE AMORTIZED.

The most important item under this heading is the discount upon the bonds, which amounts to \$97,500 and should be amortized before the bonds become due in 1952. Upon a 4 per cent compound interest basis, the annual payment to the fund would be \$1,080, plus interest upon all preceding payments.

As required by the city, the company paid to the City of New York \$12,000 for certain rights having a duration of 50 years. These payments should be amortized within the term of the grant, and the same principle should apply to the expenses (about \$6,000) incurred by the company in connection with the acquisition of the franchise and also to the cost of the property in the streets covered by the franchises of the City of New York which contain provisions that at the expiration of the franchise such property shall revert to the city without cost. The cost of the property in the streets that will thus revert to the city is approximately \$350,000, exclusive of the cost of relaying a certain amount of paving immediately after construction. The cost of both sets of paving appears in the construction account and represents a duplication to the extent of about \$5,000. This item should also be amortized through charges to operating expenses. The total amount of these items is approximately \$375,000. On a 4 per cent sinking fund basis an annual charge of \$3,000 during the remaining 47 years of the franchise would be sufficient to amortize these expenditures.

As already stated, the original issue of stock of a par value of \$33,000 is not now represented by genuine assets, certain rights having been lost through failure of the company to build its road within the time allowed. It is impossible to say definitely how much was lost by such failure or what was the cost or value of the rights, consents and documents that remain, there being no record of the amounts and purposes of the expenditures. For stock having a par value of \$28,000 the present owners paid \$8,000. At that rate the entire assets represented by the original issue would represent a cash value of about \$9,500. On the other hand, they may have been purchased at a price considerably below their value. In our opinion it would not be unfair to the present owners to allow \$15,000 for assets remaining from the original issue in 1902 and 1903, and to fix \$18,000 as an amount which should be written off from the capital account.

The discount, tax and other expenses in connection with the first issue of \$350,000 of bonds about to be retired should also be charged to profit and loss (\$5,162.50), and the same remark applies to a loss of \$6,500 on cable originally charged to transmission line but subsequently sold at less than cost.

The three items just mentioned aggregate \$30,000 and should be charged off to profit and loss at the rate of \$3,000 a year, beginning July 1, 1912.

As the company has thus far been unable to pay any dividends or interest upon funded debt and as the new bonds that are to be issued will bear interest only from March 1, 1912, it should be clearly stated that the stockholders are fairly entitled to dividends when earned from the dates when the construction period is said to have ended according to the following statement:—

Line.	Duration of Construction Period.	End of Construction Period.	Cost to that date.
	Months.		\$
Mineola line, including original stock issue.....	9	Feb. 1, 1908	385,000
Hicksville division.....	6	March 1, 1909	185,000
Flushing division including Whitestone.....	15	Nov. 1, 1910	1,030,000

In conclusion, one important fact should be noted. All of the securities, whether of a large or small amount, will go to a group of individuals acting through two persons as trustees. Whether these securities have a large or small par value, the holders control all of the earnings, either in the form of interest or dividends. If the Commission were to authorize securities having double the par value considered reasonable, the earnings of the corporation would not thereby be affected. If the amount were to be reduced to one-half the reasonable amount, the earnings would not be affected. In other words, the multiplication of securities does not increase

dividends, but it is important that when the state stamps its approval upon stock and bond issues, they should have a proper relation to the cost of the property.

In the Matter of the Complaint of the **VAN SICLEN TAXPAYERS' ASSOCIATION**, and others against the **SOUTH BROOKLYN RAILWAY COMPANY**, and other Carriers of the **Brooklyn Rapid Transit Company System**, Defendants.

In the Matter of the Hearing on the Motion of the Commission on the question of the rates and fares charged and collected by the **SOUTH BROOKLYN RAILWAY COMPANY**, the **BROOKLYN UNION ELEVATED RAILROAD COMPANY**, the **SEA BEACH RAILWAY COMPANY**, the **NASSAU ELECTRIC RAILROAD COMPANY**, the **BROOKLYN HEIGHTS RAILROAD COMPANY**, and the **BROOKLYN, QUEENS COUNTY AND SUBURBAN RAILROAD COMPANY**, for the transportation of persons in the City of New York in respect to the fares charged by those carriers to and from Coney Island.

Case No. 1375.

Rates, Fares and Charges of Common Carriers of Passengers—Trial of Commutation Fare of 'Five Cents from and to Coney Island.'—The facts stated in relation to the experimental trial of a five (5) cent fare between the Borough of Manhattan and Coney Island during specified hours on week-days during the past summer, and in relation to the agreement reached between the counsel for the complainants and for the carriers, in the course of hearings before the Commission, as to the proposed experimental trial of a commutation rate of five (5) cents from Coney Island to Manhattan during specified morning hours and a similar rate for the return to Coney Island during specified evening hours, the 1911 summer arrangement also to be continued, and the conclusion reached that in view of the stipulations and wishes of counsel for the complainants, the Commission should discontinue the proceeding without prejudice, pending trial of the proposed commutation plan, especially as it is suggested that a trial of the plan will promote very largely such a growth of population and travel along the line as will sooner or later justify a general and permanent reduction in the fare.

Rates, Fares and Charges of Common Carriers of Passengers—Growth of Population and Traffic to Enable Reduction in Fares to Coney Island.—The declaration in Cases 351 and 353, decided March 8, 1910, that it may be anticipated that the growth of population along the line of the railroads to Coney Island and at that place, will create a volume of travel that sooner or later will justify a general and permanent reduction in the fare which will be within the ability of the companies and in the interests of the public,—reiterated.

Commutation Tickets—Experimental Trial of Semi-Monthly Coupon Book Authorized—Adjustment of Possible Inconvenience of Plan.—The carriers agreed with counsel for the complainants to give between September 15 and May 15 of each year, a five (5) cent rate of fare from Coney Island to the Borough of Manhattan between 6 a. m. and 9. a. m., and from Manhattan to Coney Island between 4 p. m. and 7 p. m., on all week days except holidays, and the carriers propose to make this rate effective by selling coupon tickets or books semi-monthly, one book containing tickets good between the first and fifteenth, and the second good between the fifteenth and the end of the month, the tickets to be good for the round trip on each day and to be dated accordingly. **HELD**,—that while this method of selling tickets might, it would seem, cause some inconvenience, yet in its merits as a whole the plan seems sufficiently broad to make a trial desirable, and if it is found in actual operation to cause sub-

stantial inconvenience, it can thereupon be taken up for consideration and an adjustment found.

Practice and Procedure before Commission—Discontinuance under Stipulation of Counsel Pending Trial of Agreed Plan.—In the course of a proceeding before the Commission as to a reduced rate of fare from Coney Island to Manhattan and return, counsel for the complainants and the carriers reached an agreement on a plan which it was mutually desired should be experimentally tried, and stipulations for discontinuance were made in the record accordingly. HELD,—that in view of the wishes of the parties to the proceedings, and in view of the fact that trial of the plan will tend to bring about a condition enabling a general and permanent reduction in the fares, the proceeding should be discontinued without prejudice.

Hearings closed January 31, 1912. Opinion adopted February 21, 1912.

The facts as to this proceeding in relation to the fares between Coney Island and the Borough of Manhattan appear in the Opinion adopted.

The Opinions of the Commission in *Monheimer v. Brooklyn Union Elevated Railroad Company, et al.* (Case No. 351), and *MacReynolds v. Brooklyn Union Elevated Railroad Company, et al.* (Case No. 353), decided March 8, 1910, referred to in the Opinion adopted in the present proceeding, will be found in Volume 2 of this series of Reports.

The Opinion adopted by the Commission in Case No. 1374, decided February 21, 1912, as to the fares of the Coney Island and Brooklyn Railroad Company, will be found at page 111, *post*, of this volume.

On March 1, 1912, the Commission issued Special Permission No. 193, authorizing the Brooklyn Union Elevated Railroad Company to put immediately into effect its Local and Joint Passenger Tariff of Commutation Fares (P.S.C.—1 N.Y.—No. 1), containing the Commutation plan indicated in the Opinion adopted.

The further facts as to the matter will be found in the Opinion adopted.

Henry H. Whitman, for the Commission.

A. Sidney Galitzka, *O. F. Finnerty*, and *J. R. Abarbanell*, for the VanSiclen Taxpayers' Association and other complainants.

John J. A. Rogers, for Jonas Monheimer and other complainants.

Josiah J. White, in person.

George D. Yeomans, for the defendant carriers.

McCARROLL, Commissioner.: The Commission determined to make some further investigation into the reasonableness of the rate of fare to and from Coney Island on the lines embraced in the Brooklyn Rapid Transit system and of the Coney Island and Brooklyn Railroad Company, after a proposal had been informally made by the several companies to put into effect a special rate of fare of five cents each way during the summer months on week days from 6 to 9 o'clock a.m. to Coney Island, and between 2 and 4.30 p.m. returning from Coney Island. The Commission, on July 18, 1911, adopted an Order for a hearing on July 27 to consider the proposal mentioned and any other cognate matters. At that time and after such consideration, it was determined to suspend further hearings to permit a trial of the proposed rates during the remainder of the season of 1911 for the purpose of ascertaining how far such arrangement would satisfactorily meet the needs of the public, as might be disclosed from its operation during that time.

At the close of the summer, the hearings were resumed on October 11. The companies submitted to the Commission a statement of the travel and fares collected.

The accompanying tabulation of the result on the Brooklyn Rapid Transit lines shows that during the month of August about 10,302, and during the part of the month of September about 1,365 people availed themselves of the reduced fare during the hours named. Of course this is but a comparatively small proportion of the passengers going to and from Coney Island, but so far as it went the arrangement was of substantial advantage. The effect on the companies revenue is not of considerable importance, the amount involved being so small. It is impossible to say how many of the number of passengers carried were additions to ordinary travel induced by the lower fare, but it may be fair to assume that a considerable proportion of them were.

At the hearing on the date mentioned, and at later ones, a number of citizens appeared complaining that no provision was made in any arrangement for the number of people who reside in Coney Island and go to and from business in Manhattan and other parts of the city. They urge their right also to a five cent fare, claiming that if the companies could extend such rate to any class of passengers, it should be to those who travel the year round. They stated to the Commission that they had made representations to this effect to the officials of both companies and that a number of conferences with them had been held regarding the possibility of arranging some satisfactory provision to meet their case. They stated that it seemed likely they should be able to reach an agreement with the companies, and, therefore, asked that hearings be adjourned with a view to such conclusion. This request was granted at an adjourned hearing on the 29th of January last, the representatives of the several civic associations and other persons who had from time to time made complaint to the Commission in the matter stated that an understanding had been reached with the officials of the Brooklyn Rapid Transit Company. The arrangement proposed was stated, on their behalf, by Judge Finnerty, to be as follows, viz., that between September 15 and May 15, the companies operating the service between Coney Island and Manhattan would extend a five cent rate of fare between the hours of 6 and 9 o'clock a.m. from Coney Island and between the hours of 4 and 7 p.m. to Coney Island, to and from Manhattan and intervening points; that they would also make the same rate of fare available for school children at such hours as would meet their requirements—this rate to apply on week days except holidays. The proposal, as stated by Judge Finnerty, was confirmed on behalf of the company by its counsel, Mr. Yeomans. It was also stated by the officials of the companies that the arrangement for the summer months, *i.e.* between May 15 and September 15, which had been in effect during the season of 1911, as referred to in the beginning of this Opinion, would be continued during the coming summer in case the plan proposed were adopted.

At the hearing, opportunity was given for any who desired to make objections, but none appeared to do so. On the contrary, all agreed that the arrangement proposed met their approval, and they requested that an opportunity should be afforded the companies to put it into effect. It is the companies' intention to make this rate effective by means of commutation tickets to be sold bi-monthly, one book containing tickets good between the first and fifteenth, and another with tickets good between the fifteenth and the end of each month. The tickets are good for the round trip on each day, and dated accordingly.

The method of selling tickets might, it would seem, cause some inconvenience, and Mr. Rogers takes exception to it, but all others have expressed their satisfaction with it. If it is found in actual operation to cause substantial inconvenience it could be taken up for consideration and a plan of adjustment found. As to the merits of the plan as a whole, it seems sufficiently broad to make a trial desirable. It makes provision to a considerable degree for those whose means are limited and gives families an opportunity of a trip to the shore in the summer at a low fare. It also makes provision for the residents of Coney Island and vicinity for the other eight months of

the year, during which period there is little or no excursion travel on the part of the general public, and the residents are agreeable to forego the extension of the reduced fare in these summer months.

In adopting the Order of March 8, 1910, dismissing the complaint then under consideration (Cases Nos. 351 and 353: *Complaint of Monheimer, et al.*) on a reduction of fare to Coney Island, I called attention to the fact that it might be anticipated that the growth of the population along the line of the railroad to Coney Island and at that place would create a volume of travel that sooner or later would justify a general and permanent reduction in the fare which would be within the ability of the companies and in the interest of the public. It is suggested that a trial of the plan at present proposed would promote very largely such growth of population and travel.

In that view of the case and in consideration that substantially all of those who have made complaint in the matter of the Coney Island fare are desirous that the companies should have an opportunity to make a trial of it, I recommend that the present proceeding be discontinued without prejudice and an order to that end adopted by the Commission.

COUPONS UNDER SPECIAL CONEY ISLAND EXCURSION FARE.

AUGUST.

	Coupon No. 1 (arriving).	Coupon No. 2 (departing.)
Nassau—		
West End Terminal..... {	271 }	1,475
	1,975 }	
Brooklyn Union—		
Brighton Beach..... {	203 }	343
	359 }	
Ocean Parkway..... {	540 }	312
	222 }	
Culver Terminal..... {	5,418 }	6,783
Sea Beach—		
West End Terminal..... {	251 }	1,389
	1,823 }	
South Brooklyn—		
Culver Terminal..... {	1,688 }	
	12,750 }	10,302

SEPTEMBER.

Nassau—		
West End Terminal..... {	255 }	179
	4 }	
Brooklyn Union—		
Brighton Beach..... {	35 }	43
	9 }	
Ocean Parkway..... {	78 }	64
	527 }	
Culver Terminal..... {	298 }	907
Sea Beach—		
West End Terminal..... {	3 }	172
	184 }	
South Brooklyn—		
Culver Terminal..... {	299 }	
	1,692 }	1,365

In the matter of the Complaint of the VANSICLEN TAXPAYERS' ASSOCIATION, and others,
against the CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Defendant.

In the Matter of the Hearing on the Motion of the Commission on the question of the
rates and fares charged and collected by the CONEY ISLAND AND BROOKLYN RAIL-
ROAD COMPANY for the transportation of persons in the City of New York, in
relation to the fares charged by that carrier to and from Coney Island.

Case No. 1374

Rates, Fares and Charges of Common Carriers of Passengers—Trial of 'Five Cent Fare from and to Coney Island.'—For the reasons stated by the Commission in Case No. 1375, decided February 21, 1912, the proceeding as to the fares charged by the C. I. and B. R. R. Co. from and to Coney Island will be discontinued without prejudice, under stipulations of counsel for the respective parties, pending a trial establishment of a five (5) cent fare during specified hours on week-days except holidays, from September 15th to May 15th of each year.

Hearings closed February 15, 1912. Opinion adopted February 21, 1912.

The facts in relation to this proceeding appear in the Opinion adopted and in the Opinion in Case No. 1375, decided on even date, which will be found at page 106, *ante*, of this volume.

The Order entered dismissed the proceeding without prejudice.

Henry H. Whitman, for the Commission.

John J. A. Rogers, for Edward Ehrman and other complainants.

D. J. Lyons, for Sheepshead Bay property owners.

A. Sidney Galitzka, *O. F. Finnerty*, and *J. R. Abarbanell*, for the VanSiclen Taxpayers' Association and other complainants.

Josiah J. White, in person.

Dykman, *Oeland* and *Kuhn*, by *John J. Kuhn*, for the defendant carrier.

McCARROLL, *Commissioner*: Following the action of the Commission on February 6, 1912, in the matter of the Coney Island fares on the lines of the Brooklyn Rapid Transit system, at an adjourned hearing on the same matter with the Coney Island and Brooklyn Railroad Company, which was held on February 14th, the counsel for the company stated that it would make a similar rate of fare as that proposed by the Brooklyn Rapid Transit companies. The counsel stated that the manner in which the same would be made effective had not been finally determined by the company, but that probably it would be a straight five cent fare.

The proposal of this company meets with the satisfaction of those who had complained, as in the case of the other company, and they request that the company be permitted the opportunity of making a similar trial.

The same reasons which have been considered in the Opinion in the case of the Brooklyn Rapid Transit companies apply in this case, so that it is not necessary to repeat them here.

On those grounds, I recommend the discontinuance of the present proceeding without prejudice and the adoption of the accompanying Order to that effect.

The New York Public Service Commission for the First District has jurisdiction within the four counties of New York, Kings, Queens and Richmond, comprising the City of New York. As defined by the Public Service Commission's Laws (Consol. L., ch. 48, as am'd), the Commission has jurisdiction over railroads, street railroads, gas and electrical corporations, and other enumerated public services, within the First District. Under the Rapid Transit Act (L. 1891, ch. 4, as am'd), the Commission is vested with franchise-granting and contractual powers in behalf of the City of New York, in providing for the construction, equipment and operation of rapid transit lines laid out by the Commission pursuant to that Act.

In the Matter of the Application of the WESTCHESTER STREET RAILROAD COMPANY for authorization to issue capital stock.

The entire property of the Tarrytown, White Plains and Mamaroneck Railway Company was sold at public judicial sale; and all of said property except a small portion of the track a little upward of one mile in length was sold to one Richard Sutro, who assigned the bid to The Westchester Street Railroad Company, a corporation organized for the purpose of taking and holding the said property. The Westchester Street Railroad Company makes application to the Commission for authorization to issue its capital stock in payment of the moneys required to make the purchase, and also to cover certain expenses incurred by the corporation with reference thereto. The total amount asked for is the sum of \$912,023.46.

The Commission finds the following facts from the evidence taken and the investigations made by it:—

(a) The duplication cost of the physical property acquired by the company, less depreciation, was \$445,693.98.

(b) The purchase price of the property, including certain back taxes and other liabilities assumed by the purchaser, amounted to \$882,400.78. The remaining sum of \$29,622.68, for which the applicant desires to issue capital stock, is the aggregate of certain legal and other expenses incurred by the applicant in connection with acquiring the property.

(c) The earning power of the property from the beginning of operation to the close of the fiscal year ended June 30, 1911, proved to be nothing, the operations of the road having resulted in a very considerable deficit exclusive of fixed charges and depreciation. The operating deficit for the eight years 1904-1911, both inclusive, was \$37,872, exclusive of a large amount of unpaid taxes, fixed charges, and depreciation.

(d) The road is saddled with a franchise which requires it to transport passengers from Mamaroneck to White Plains for five cents. This operation, according to the figures submitted, results in loss to the company; and the claim is made by it that the enforcement of the franchise for a period of practically one year and ten months from December 8, 1909, to September 30, 1911, would have resulted in an operating deficit of \$6,076.71.

(e) The operating revenues of the road have increased very largely during the period 1904-1911: the total for 1904 being \$95,057, and for 1911, \$228,585. The prospects for future increase of business are good, and under good management it is believed the road can be made productive of net revenue.

(f) The value of the property at the time of sale, taking into consideration all of the foregoing matters, was \$400,000. The corporation was entitled to issue capital stock to that amount, and also for certain other expenses connected with the organization of the corporation and the acquisition of the property.

The principles upon which determinations of value of an existing property for the purposes of capitalization should be based, discussed at length. The rule recently laid

down by the Legislature in section 55a of the Public Service Commissions Law, that such value is to be ascertained by 'taking into consideration original cost of construction, duplication cost, present condition, earning power at reasonable rates, and all other relevant matters,' is approved by the Commission.

Decided April 24, 1912.

William Greenough for applicant.

STEVENS, *Chairman*:

The Westchester Street Railroad Company makes application to this Commission for authorization to issue its capital stock to the amount of nearly \$1,000,000, for the purpose of acquiring nearly all the electric street railroad formerly owned by the Tarrytown, White Plains and Mamaroneck Railway Company. The questions involved in this application are so peculiar and difficult that a careful and somewhat extended statement of the facts upon which the application is to be disposed of is necessary.

History of the Tarrytown, White Plains and Mamaroneck Railway Company:

The Tarrytown, White Plains and Mamaroneck railroad extended from Tarrytown to White Plains, and from White Plains to Mamaroneck. It had several short branches extending northerly at or in the vicinity of White Plains; it also had a branch extending southerly from White Plains to Scarsdale, and a branch extending southwesterly from Mamaroneck to the easterly line of the village of Larchmont. The road has been in operation for about fourteen years, in part. The lines from White Plains to Mamaroneck and from Mamaroneck to Larchmont were constructed later, in about 1904 or 1905. The road fell into a very bad way, both physically and financially, with the result that a foreclosure of the mortgage upon the property was instituted in the year 1909, a temporary receiver appointed, and a judgment of foreclosure and sale was finally entered in the office of the clerk of the County of Westchester on the 23rd day of July, 1909.

A sale of the property pursuant to the judgment of foreclosure was had on the 5th day of November, 1909, at which sale one Richard Sutro, acting for and on behalf of The New York, New Haven and Hartford Railroad Company, purchased the greater part of the railroad. The order confirming the sale was entered in the Supreme Court on the 20th day of November, 1909, and on December 1, 1909, Sutro paid to the referee, pursuant to the terms of the judgment, the sum of \$825,000, as follows:—

Cash deposit at time of sale.. . . .	\$ 25,000 00
Cash paid referee December 1.. . . .	529,747 26
<hr/>	
Total cash paid.. . . .	\$554,747 26
247 bonds secured by mortgage.. . . .	247,000 00
Coupons.. . . .	6,175 00
Interest.. . . .	10,943 48
Interest.. . . .	273 58
Interest.. . . .	5,860 58
<hr/>	
Total paid.. . . .	\$824,999 90

The bonds deposited with the referee, 247 in number, were a part of the 300 bonds of \$1,000 each upon which the foreclosure was made. These bonds were owned by the New Haven company, and were purchased by it in the year 1909, by the exchange of New York and Stamford Railway Company bonds owned by it, which bonds had been shortly theretofore issued by the New York and Stamford company under an authorization of this Commission to pay an indebtedness to the New Haven company for cash advances. So far as appears in the case, the New Haven company had no con-

nection with the Tarrytown, White Plains and Mamaroneck Railway Company until, subsequent to March, 1909, it acquired the bonds in question and caused the foreclosure to be instituted with a view of acquiring the railroad, either in whole or in part.

The applicant, The Westchester Street Railroad Company, was incorporated under the laws of the State of New York on December 1, 1909; the certificate of incorporation refers to and recites the foreclosure sale of the Tarrytown road, the purchase of parcels Nos. 1 and 2 by Sutro, that Sutro had associated with himself certain other persons named in the articles of incorporation, describes the property purchased at the sale, provides that the maximum amount of capital stock of the new corporation shall be \$1,000,000, consisting of 10,000 shares of the par value of \$100 each, and further recites that Sutro and his associates, pursuant to the provisions of section 9 of the Stock Corporation Law, desire to become a corporation for the purpose of taking and holding the property purchased by Sutro at the sale aforesaid.

On the 3rd day of December, 1909, the Supreme Court made an order which was entered on the 4th day of December, 1909, authorizing Sutro to assign to the applicant his right to the deed to the property purchased by him, and authorized The Westchester Street Railroad Company to accept the assignment.

On the 4th day of December, 1909, in a form approved by the court, Sutro assigned to The Westchester Street Railroad Company his right to the deed; and thereafter, on December 7, 1909, pursuant to the said orders of the court, the referee making the sale conveyed to the applicant, The Westchester Street Railroad Company, the property, premises, rights, privileges, and franchises described in the judgment of foreclosure as parcels Nos. 1 and 2.

Stock authorization asked for:

The applicant, The Westchester Street Railroad Company, now asks this Commission to authorize it to issue its common capital stock to the amount paid by Sutro pursuant to the terms of his bid, namely \$825,000, and the other sums which have been paid by him in connection with the transaction and pursuant to the terms of his bid; the entire amount for which capitalization is asked is stated as follows:—

Paid to referee, as hereinbefore stated.	\$825,000 00
Arrears of taxes paid to State of New York and sundry local authorities.	46,761 49
Arnold claim.	8,000 00
Riggins tort claim.	1,750 00
Hitchins tort claim.	200 00
Paving taxes, White Plains.	689 29
Services of attorneys with reference to special franchise.	554 80
Incorporation tax.	500 00
Certificate of incorporation.	25 00
Legal expenses of attorney in connection with procur- ing bonds at foreclosure sale and reorganization sale generally.	15,149 92
Services of Sutro in the matter.	11,190 15
One desk and chair.	29 40
One stove, etc.	25 47
Westinghouse, Church, Kerr & Co., for appraising property subsequent to purchase.	2,147 97
Total.	\$912,023 46

The New York, New Haven and Hartford Railroad Company makes a joint application, in which it asks that this Commission consent that the entire capital stock thus to be issued may be taken and held by it.

Primary question presented by the case:

The applicant is entitled by law to take and hold the railroad property involved. It is entitled to issue stock for the same. The only question presented is, how much stock shall be issued for it. The sole purpose of an issue of stock is the acquisition of property. The amount which may be issued is governed by the provisions of section 55 of the Stock Corporation Law, which reads as follows:—

No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purpose of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation or necessary for the use and lawful purposes of such corporation and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation but shall be reported as issued for property purchased.

Section 55 of the Public Service Commissions Law provides that a railroad corporation may issue stock when necessary for the acquisition of property 'provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the issue or proceeds thereof are to be applied, and that in the opinion of the Commission the property to be procured or paid for by the issue of such stock is reasonably required for the purposes specified in the order.'

It is clear from these two provisions of law that the stock to be issued in this case for the acquisition of the property in question must be only equal in amount to the amount of the value of the property, and that the question for the Commission to solve is the value of the property.

It is not understood that the applicant claims that the provision in section 55, 'in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive,' is applicable to this case and binding upon this Commission. This provision was enacted many years previous to the passage of the Public Service Commissions Law and for purposes which have no connection with the administration of that law. It has been the uniform practice of this Commission to inquire into and pass upon the value of property acquired by a corporation for which it seeks to issue stock or bonds, and it has been uniformly assumed by the Commission and by those seeking its authorization that this provision did not apply to determinations made by the Commission in fixing the amount of stock or bonds which could be issued for such acquisition. It will be unnecessary, therefore, to discuss this point further. The question in this case for the Commission to solve is the value of the property sought to be capitalized.

In what manner and upon what principles the value of the property is to be determined:

It is indispensable that at the outset there should be a complete consideration of the manner in and the principles upon which the value of the property is to be determined. This may seem to be a simple matter, but instead it is most difficult and complex. The difficulties arise from a variety of matters which it is now proper to treat in detail.

The determination of the value of property by governmental authority may become necessary in a variety of cases, but for our purposes we may consider only the three principal classes: (1) Assessments for purpose of taxation; (2) valuations in the fixing of rates to be charged by public service corporations; (3) valuations necessary

in the authorization of capitalization of such corporations. In the first two classes, rules for fixing value have been very largely considered by the courts. In the third class, such rules have not, so far as I am aware, been laid down by any judicial authority which is binding upon this Commission. In solving the immensely important and highly intricate question, what rule should we follow, we are bound by nothing in the way of arbitrary authority and the whole subject is open to the freest examination and discussion. It is undoubtedly prudent, if not indispensable, to review the decisions of the courts in taxation and rate cases. Whether such examination will result in light will be better known at its conclusion.

It must be premised that no case which has come under my notice decides the precise questions which must be settled in a capitalization case although the language of the court may appear to be applicable. Attention will therefore be largely directed to the reasoning of the various cases cited for the purpose of showing the differing theories which have received judicial sanction.

One well known and well understood method of fixing the valuation of a railroad property is that commonly called a commercial valuation, which is arrived at by ascertaining the cash or market value of the shares of stock and of the funded debt. This seems to have great judicial support. *Taylor vs. Secor*, 92 U. S. 575, decided by the United States Supreme Court in 1876, is one of several cases commonly known as the state railroad tax cases. The opinion of the court was delivered by Mr. Justice Miller, and the following extracts from it are of large importance:—

It may be assumed for all practical purposes, and it is perhaps absolutely true that every railroad company in Illinois has a bonded indebtedness secured by one or more mortgages. The parties who deal in such bonds are generally keen and farsighted men, and most careful in their investments. Hence the value which these securities hold in market is one of the truest criteria, so far as it goes, of the value of the road as a security for the payment of those bonds.

These mortgages are, however, liens on the road, and taking precedence of the shares of the stockholder, may or may not extinguish the value of his shares. They must in any event affect that value to the exact amount of the aggregate debts; for all that goes to pay that debt and its interest diminishes *pro tanto* the dividend of the shareholder and the value of his share.

It is, therefore, obvious that when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock.

This would, of itself, be, perhaps, the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt.

Regarding the method of ascertaining the value of the roadbed, tracks, and other structures connected therewith, of a railroad, the court makes the following remarks:

But, as we have already said, a railroad must be regarded for many, indeed for most purposes, as a unit. The track of the road is but one track, from one end of it to the other, and except in its use as one track, is of little value. In this track as a whole, each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy by any means a few miles of this track, within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago,

or some other place where its largest traffic centers. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.

The headnotes of the case were prepared by Justice Miller, and one of them states succinctly and accurately the courts approval of the commercial valuation method in the following language:

The capital stock, franchises, and all the real and personal property of corporations, are justly liable to taxation; and a rule which ascertains the value of all this, by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment, is probably as fair as any other.

One may, perhaps, be permitted to inquire what is meant when the learned justice remarks in the first quotation: 'This would, of itself, be, perhaps, the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt.' It would seem to indicate an opinion that the rule would not hold good in the case of an insolvent company although just in the case of one which is solvent. Without criticising the distinction, if there be one, the observation is warranted that, assuming its validity, the commercial valuation rule would be valueless in the case of a property which has been sold at judicial sale, the corporation whose title or interest was sold being obviously in the class of insolvents.

In *Pittsburg, Cincinnati, Chicago and St. Louis Railway Company vs. Backus*, 154 U. S. 421, decided in 1894, the opinion of the same court was delivered by Justice Brewer. The language used by the court in the state railroad tax cases supporting the commercial valuation theory of assessment is cited with approval and followed.

The language of the Supreme Court of Tennessee in the case *Franklin County vs. Railroad Company*, 12 Lea 521, is also cited with approval, such language being as follows:

The value of the roadway at any given time is not the original cost nor *a fortiori* its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value can not be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock, and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road.

This of course constitutes a distinct and unqualified disapprobation of the theory that cost of reproduction is a fair measure of the value of a railroad roadway and the structures thereon.

In *Adams Express Company vs. Ohio State Auditor*, 165 U. S. 194, decided in 1896, by the same court, the State of Ohio had by statute directed a particular method of assessing the property of express companies doing business within that State. This statutory method was as follows:

In determining the value of the property of said companies in this State to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid.

The company had no property in the State of Ohio other than personal. The value of this personal property was averred in the bill and was conceded by the demurrer upon which the case came before the court to have been correct. The valuation thus returned and the amount of the assessment levied on such personal property by the state board were as follows:

Assessment for 1893:

Value as alleged in the bill.. . . .	\$ 53,080 74
As assessed by the state board.. . . .	460,033 08

Assessment for 1894:

Value as alleged in the bill.. . . .	41,102 60
As assessed by the state board.. . . .	543,569 00

Assessment for 1895:

Value as alleged in the bill.. . . .	42,065 00
As assessed by the state board.. . . .	533,095 80

The precise questions decided by the court are not material at this time. The interesting part of the discussion is how the differing theories as to the proper mode of assessing values were treated. Without naming them the court had in mind commercial value, net earning power capitalized, and cost of reproduction. Chief Justice Fuller in the prevailing opinion uses the following language:

As to railroad, telegraph, and sleeping car companies engaged in interstate commerce, it has often been held by this court that their property in the several States through which their lines or business extended might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State without violating any Federal restriction. The valuation was, thus, not confined to the wires, poles, and instruments of the telegraph company; or roadbed, ties, rails, and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole; or, taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of all its lines everywhere,

deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State.

In the following language he distinctly negatives the idea that cost of reproduction is, at least in the case before him, the true measure of the value of property which is used as a unit in the public service:

But the property of an express company distributed through different States is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business.

It is this which enabled the companies represented here to charge and receive within the State of Ohio for the year ending May 1, 1895, \$282,181, \$358,519, and \$275,446, respectively, on the basis, according to their respective returns, of \$42,065, \$28,438, and \$23,430 of personal property owned in that State, returns which confessedly do not, however, take into account contracts for transportation and accompanying facilities.

Considered as distinct subjects of taxation, a horse is, indeed, a horse; a wagon, a wagon; a safe, a safe, a pouch, a pouch; but how is it that \$23,430 worth of horses, wagons, safes, and pouches produces \$275,446 in a single year? Or \$28,438 worth \$358,519? The answer is obvious.

Upon an application for a rehearing reported in 166 U. S. 185, Mr. Justice Brewer, speaking for a majority of the court, used the following language, which is a vigorous argument in favor of determining value by net earning power:

Now, it is a cardinal rule which should never be forgotten, that whatever property is worth for the purposes of income and sale it is also worth for the purposes of taxation. Suppose such a bridge were entirely within the territorial limits of a State, and it appeared that the bridge itself cost only \$1,277,000, could be reproduced for that sum, and yet it was so situated with reference to railroad or other connections, so used by the travelling public, that it was worth to the holders of it in the matter of income \$2,900,000, could be sold in the markets for that sum, was therefore in the eyes of practical business men of the value of \$2,900,000, can there be any doubt of the State's power to assess it at that sum, and to collect taxes from it upon that basis of value? Substance of right demands that whatever be the real value of any property, that value may be accepted by the State for purposes of taxation, and this ought not to be evaded by any mere confusion of words. Suppose an express company is incorporated to transact business within the limits of a State and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars worth of horses and wagons, and yet it so meets the wants of the people dwelling in that State, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the State of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possess? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation.

The question has arisen in the English Privy Council. According to an article in the *Electrical World* for June 30, 1910, the Judicial Committee of the Privy Council of England, upon an appeal from the Supreme Court of New Zealand, has had occasion to pass upon the question of value of a 'gas works and plant'. In 1895

an act of the New Zealand legislature authorized the Hamilton Gas Company to construct works in the city of that name, on condition that the City might purchase the 'gas works and plant' after twelve years, at a price to be determined by arbitration. The City decided to purchase the works, and as the arbitrators could not agree on the valuation, an umpire was appointed. The umpire found that the value of the gas works and plant, considered merely as a structure, was about \$65,000, but that the commercial value of the works, that is, the value of the plant and business combined, was about \$150,000; and a case was stated for the Supreme Court of New Zealand as to which basis of valuation should be adopted. The contention of the gas company was as follows:

At the hearing the gas company contended that the price to be paid for the purchase of the gas works and plant should be the commercial value thereof as a going concern, taking into consideration their present condition, rental value, earning power, and all surrounding circumstances and not merely as on a sale of apparatus *in situ* and land and buildings; and that the arbitrators and umpire, in arriving at and determining such price, were entitled to capitalize the net annual profit or rental, which, in their opinion, the gas company was, and might reasonably be expected to be, able to continue to earn and receive thereby and therefrom.

The contention of the City was as follows:

The Borough Council claimed that the price should be merely the value of the gas works and plant regards as gas works and plant *in situ* capable of earning a profit, and that this value should be arrived at by taking the present value of the land and buildings and adding thereto what would be the present cost of the machinery and materials of a similar gas works and plant, and of placing such gas works and plant *in situ* and making good the ground and deducting a sum for depreciation; or, by taking the cost of the land, buildings, gas works and plant, and laying down the gas works and plant, making good the ground, and deducting a sum for depreciation.

Here was presented a direct conflict between the two theories of earning power and reproductive cost. The judgment delivered by the Privy Council sustained the contention of the gas company and fixed the value of the property at the earning power capitalized. The value awarded was two and three-tenths times as great as the mere reproductive cost, less depreciation, and this higher value was obtained by capitalizing the annual net profits that the company was earning and might be expected to continue to earn.

The net result of the cases in the United States Supreme Court in which the method of valuing the property of solvent railroad corporations for the purposes of taxation has come up for consideration, is that the commercial method of valuation is the one which is to be followed, as giving the most satisfactory results.

In the State of New York the proper method of assessing railroad property for the purposes of taxation has received considerable attention, with results which will best be understood by a brief consideration of some of the principal cases. The question came before the court of Appeals in 1871, in the case of *People ex rel. Buffalo and State Line Railroad Company vs. Peter Barker et al., Assessors of the Town of Evans*, reported in connection with a like case against the assessors of the Town of Hamburg, reported together in 48 N. Y. 70. It appears from the report that the assessors of the Town of Hamburg assessed the property of the relator within the town at \$225,000. The relator submitted to the assessors proof that the entire value of its land and superstructures and fixtures within the town did not exceed \$68,667.70, and apparently although it does not appear distinctly in the case, this was what the relator deemed to be the cost of reproduction. The assessors, in making up their

assessment, took into consideration the value of the entire road and its earning power considered as a whole. It does not clearly appear in the case, the precise theory upon which they acted, but there can be little doubt that they adopted a theory which excluded the idea of the cost of reproduction within their respective towns. The action of the assessors was affirmed by the unanimous judgment of the court. The following are extracts from the opinion:

The argument of the relator's counsel is that this (the relator's right of way) should be assessed as an isolated piece of land, having in substance no beginning or end; that is not connected with anything at either end beyond the limits of the town. A railroad through the town of Hamburg only, having no connection at either end, would be of no value. The erections and superstructure would destroy its value for farming purposes. As a railroad it would have no passengers and no business, and would be worthless. The attempt to use it as such would involve debt and embarrassment, but no profit. In like manner the portion of the Erie canal passing through a single town, with no outlet at either end, would be valueless. A mill-race disconnected from the mill would be of no value. Each item of property, however, with its connections and accompaniments, and used for the purpose and in the manner intended, might be of great value. *Each piece of property is to be estimated in connection with its position, and the business and profit to be derived therefrom.* The road in question is part of a whole, and is to be valued as such. This is independent of the taxation of the capital. It is an estimate of the value of the real estate for railroad purposes, as a mill is to be estimated for its value for milling purposes and not at its value for a church or banking house.

This language clearly negatives the idea of cost of reproduction being the proper standard by which to measure the value of a part of the roadbed of a railroad. It was, however, overruled by the Court of Appeals in the case of the *People ex rel. D., L. & W. R.R. Co. vs. Clapp*, 152 N.Y., at page 496, which case will hereinafter be commented upon.

In *People ex rel. O. & L. C. R.R. Co. vs. Pond*, 13 Abb. N. C. 1, decided in 1882, the General Term of the Third Department of the Supreme Court adopted the opinion of Mr. Justice Potter delivered at Special Term, in which occurs the following language:

The positions occupied by the contestants are practically these: That the relators contend the value should be determined mainly, if not altogether, from the productiveness of its use for the purpose for which it was organized, and the respondents contend that its value is to be determined by its cost.

From the statement of the facts of the case it appears that the railroad company which was seeking to have its assessment reduced, produced evidence concerning its gross and net earnings. Upon this basis it was shown that the value of the road per mile was \$5,231. There was situate in the town of Burke, in which the assessment was made that was reduced, about five miles of the relator's road, so that the assessment should have been substantially \$25,000 upon this basis. The relator was actually assessed at the sum of \$80,000 in this town. Upon these facts the learned Justice said:

Neither contention is absolutely correct. The true rule involves both elements in some degree, and perhaps other considerations. To take the cost of a piece of real estate as a criterion of its value, in very many cases would be unwise and oppressive as the basis of taxation. Many pieces of real estate costing large sums of money and at one time possessing great value, have within the space of a few years ceased to have any considerable value or to be

for any purposes desirable. Dependent almost entirely upon the pleasure or profitableness of its use, or in other words to what extent it comes up to the standard of value contended for by the relator. Very many costly structures, and rarely any more so than railroad structures, have totally failed to pay any interest or income upon their costs, or even to pay current expenses. Factories, mills, hotels, and private residences are instances of this kind to be found almost everywhere. To ascertain the true taxable value of many kinds of property requires the exercise of a good degree of intelligence and of broad and sound judgment.

The taxable value of a railroad should not be determined alone by the long, narrow strip of land for farming or any other purpose except its use for the bed of a railroad. Nor should the portion of a railroad situated in a particular town be estimated by the cost of any expensive rock cut, or quicksand filled, or a long tunnel located in that town. It should be valued as a part of a whole, a continuous way to carry passengers and freight from one commercial business point to another, and the profits of its use for that purpose. The consideration of profits should have a large, if not controlling influence upon the value of almost everything, except when considerations of taste or pleasure or comfort are involved. A thing to be worth its cost must be able to pay out of the profits from its use and enjoyment an income bearing some relation to the interest due from an investment or loan of a sum of money equal to such cost, and over and above the loss by wear or waste.

People ex rel. The Albany & Greenbush Bridge Co. vs. Weaver, 34 Hun 321, decided in 1884, by the General Term, Third Department, of the Supreme Court: The Albany and Greenbush bridge had been assessed by the assessors at \$225,000. The Special Term reduced the valuation to \$110,000. This determination by the Special Term was affirmed by the General Term. The following is the entire discussion given by it:

The property in question is business property, created for the purpose of earning money. With respect to such property this court has decided that in ascertaining its 'full value' its cost may be considered, but the more controlling consideration is its earning capacity. [Citing the Pond case just referred to.] In the present case the court considered its original cost, and what it would cost to re-create it at the present reduced prices of material and labor. It also considered the fact that its cost was enhanced to fit it for railroad service, an expected source of business which was not secured, and which now seems to be permanently lost. The bridge has been doing all the business offered, for a sufficient length of time to afford a fair test of its earning capacity. Under such circumstances it seems to be just to give controlling weight to its earning capacity.

This, of course, is a clear and distinct adjudication that earning capacity when once well established is the controlling rule to be observed in assessments for taxation, at least where the property is all situate within one tax district.

In *People ex rel. Powers vs. Klafleisch*, 25 App. Div. 432, decided in 1898, the Appellate Division, Fourth Department, held that a very valuable building which has no market value because no building like it has been sold, should be assessed upon the basis of its earning capacity, with some reference however to the cost of reproduction. The building in this case was the Powers Block in the city of Rochester. Some remarks of the court are worthy of citation. At page 434 it says:

The actual cost of a piece of property is often a fact of great potency in determining its real worth; but it is by no means the only one, and in this particular instance it would prove of little value as a guide, for the reason that the lot upon which the building stands has nearly doubled in its market

value since it was purchased by the relator, while the building itself, which was erected at a period when the materials of which it was constructed cost very much more than the same materials would cost at the present time, is obviously worth much less than it was when it was first built. This being the case, it is apparent that some other and more satisfactory rule of valuation should, if possible, be employed.

Again at page 435:

If a man possesses a piece of property which has a fixed and certain market value, it is much less difficult to determine what that property is worth in the payment of a debt than would be the case if its face value were fluctuating and uncertain; and, unfortunately, the relator's property belongs to the latter class. It cannot be said to have any market value for the reason that there is no other property like it in the city, and consequently none has ever been put upon the market.

Again, upon the same page, the court says:

Eliminating, therefore, all considerations of the market value of the property in question, we find that there remain two other methods of ascertaining its true and full value, and these are the ones which, as we understand it, were adopted by the learned referee. They are, first, its earning capacity as an investment; and second, the probable and natural cost of its reproduction. It is urged by the learned counsel for the defendants that too much prominence was given upon the hearing at the special term to the first of the two methods just mentioned; but we are inclined to think that the net income of a building constructed for commercial purposes and as an investment is an important element in determining its assessable value. For, as was said in an analogous case, 'a thing to be worth its cost must be able to pay out of its profits from its use and enjoyment an income bearing some relation to the interest due from an investment or loan of a sum of money equal to such cost and over and above the loss by wear and waste.' [*People vs. Pond*, 13 Abb. N. C. 1.] To illustrate, no one would ever think of purchasing the Powers Block for any other reason than because it was a revenue producing investment, and consequently its net income must necessarily bear a ratio to and determine its true value.

In the case of *People ex rel. D., L. & W. R. R. Co. vs. Clapp*, 152 N. Y. 490, decided in 1897, which involved the assessment of real estate of the relator in the town of York, in the county of Livingston, the assessors adopted a method of arriving at the true valuation which was stated by them in their return as follows:

In fixing upon the sum at which the real property was assessed, we considered the same not as a separate piece of real estate standing alone, but as a part of the extensive and valuable system of railroads leased and occupied by said relator, extending from the city of Binghamton to the city of Buffalo, and as a part of the extensive and valuable system of railroads operated by the relator, and based our said assessment thereof upon the cost, rentals, and earnings of said railroad as shown by the annual report of said relator to the Board of Railroad Commissioners of the State of New York.

It appeared that the relator gave proof, which was uncontradicted, with respect to the cost of reproducing the seven and one-fourth miles of railroad in the township of York, with the tracks, roadbed, tanks, and buildings, and their total cost was materially less than the sum at which the assessors fixed the value. Upon this state of facts the court said:

It is difficult to formulate from the adjudged cases any general rule or principle applicable in all cases to the valuation of the real estate of a railroad for the purpose of taxation.

After a considerable discussion the court finally says:

The cost of reproducing these seven miles of railroad seems to us to be the just and reasonable rule of valuation. There is no reason that we can perceive for assessing this property at a greater sum than the cost of replacement. It may not in every case be worth what it would cost to reproduce it. That would depend upon the income or earning capacity of the road after it is built. But this is the case of a paying railroad, and, when valued at what it would cost to procure the land, construct the roadbed, put down the ties and rails, and erect the buildings and other structures, all new, it is difficult to see any ground for assessing it at a larger sum. It may in any case be competent to consider all the elements of value that they have considered in this case, but in the end, when they come to make their decision as to value, for the purpose of taxation, it may properly be much less, but can never exceed the actual cost of producing the property in the condition in which it is found by the assessors at the time of making the assessment. Such rule of valuation is reasonable and possible.

The same rule, of course, applies in each tax district of the State, and hence it follows that the rule for assessing the real property of an entire railroad situate within the State of New York is the reproductive cost of the road as it stands.

The court, in referring to the Barker case, 48 N.Y. 70, disposes of it in the following manner:

In so far as they hold that the real estate of a railroad in a town is not to be assessed as an isolated piece of land, but with reference to its position as a part of a line of railroad with all its incidents, including the business and profits to be derived therefrom, they are doubtless correct. The property in question would be worth practically nothing except for its position as part of a railroad system. It has value as part of the whole property and practically no value when detached or severed from it. But the question still remains, what is the reasonable and practical method of estimating that value? Is it by an intricate calculation of the rentals, earnings or profits per mile capitalized, and then followed by arbitrary deductions on account of the greater earning capacity of some parts of the property over other parts, or is it the cost of reproducing the same part of the railroad? The assessors have to deal with actual, visible, tangible property. A railroad may possess things intangible, as privileges or franchises of great value, and that are very important elements in its earning capacity, but the assessors have no power to include them in the valuation of real estate, and any method of valuation which includes them as a part of the real estate is erroneous. The assessment of the real estate upon a basis of profits or income of the whole railroad must necessarily attribute to the real estate a value which should be shared with the personal property and franchises.

This is the leading case in the State of New York giving controlling weight to cost of reproduction as the basis of determining fair or full value. Liberal extracts have been made from the opinion, which however should be consulted in full, for the purpose of showing that the real ground of decision *was not that the cost of reproduction was necessarily a true basis of value, but the only practical and practicable basis.* The theory upon which the case proceeds is that the assessors in the town through which a railroad passes were then required by law to assess only the real estate in their town and to give a value to it. That whenever they undertook to consider the

earning capacity of the road they would be confronted with the problem of determining how much was earned by the railroad and how much by the personal property, and how much by the franchises and other intangibles constituting part of the property of the company. That the task of making such a determination would be too great for the capacity of the average assessor and would necessarily result in erroneous decisions. That it would be better to confine the assessors to some simple, definite rule of assessment of the real estate in their respective towns, easily applied and which would result in practical justice. Whether the court succeeded in finding a just rule is not the question. It adopted the cost of reproduction, with all its known inconsistencies and absurdities. Thus, in one town, five miles of track may have been constructed upon level ground, at little expense; while in an adjoining town the same amount of track may have been constructed at great expense, including a tunnel, an expensive fill across a deep gorge, or a highly expensive bridge across a river. The portion of the road in the town of lesser expense would be of as great value to the operation of the road as the other, and would contribute as much of its earning power, and yet the assessment might be but one-tenth or one-twentieth part of that in the adjoining town. If there is any rational or consistent theory upon which such discrepant assessments could be justified, it is that of cost of reproduction; but whether the end is accomplished by that sort of assessment is open to doubt.

It must be noted that the opinion of the court, in none of its reasoning, attempts to sustain the position that if the road could be valued as a whole the cost of reproduction would be the controlling factor or even a factor of very much weight.

By section 2 of the Tax Law, certain franchises, rights, authority, and permission are known as special franchises, are made or treated as real estate or real property, and in connection with certain physical structures laid in streets are assessed as real property, pursuant to the provisions of section 43 of the Tax Law. This assessment of a special franchise is made by the State Board of Tax Commissioners.

In the case of *The People of the State of New York ex rel. Jamaica Water Supply Company vs. The State Board of Tax Commissioners*, 196 N.Y. 39, decided on the 19th day of October, 1909, it was held that the Legislature has not seen fit to prescribe any rule by which the value of special franchises is to be ascertained, and that it is beyond the province of the courts to lay down an exclusive rule of franchise valuation applicable to all cases, although in many cases the application of the net earnings rule would result in a fair and just valuation. At page 51 Judge Bartlett says:

In our opinion it is beyond the province of the courts to lay down an exclusive rule of franchise valuation applicable to all cases. Of course, if there were only one reasonable method of getting at the true value of a special franchise, it would plainly be the duty of the state board to adopt that method. It is conceded, however, that there are many reasonable methods, and it is not for the courts to insist that one shall be pursued rather than another so long as the legislature has chosen to leave them all equally open to the assessing officers.

At page 52 the court cites with approval the language of Judge Earl, as follows:

There is no law or authority which requires assessors, in making assessments, to adopt any certain or fixed rule or method. The only rule for their guidance is the actual value of the property to be assessed, and they may avail themselves of all tests of such value within their reach, and of every fact, and all information which in their judgment has any bearing upon such value.

It should be remarked that this language, thus approved, assumes that there is such a definite and certain thing as actual value, and that if the inquiry in search of it be prolonged far enough and with sufficient diligence the actual value may be ascertained. On page 55 the court further says:

While, as we have already pointed out, the legislature has not prescribed any exclusive or hard and fast rule for assessing the value of special franchises, we think that in the case of this relator and many other corporations similarly circumstanced the adoption and application of the net earnings rule would result in a fair and just valuation.

This rule is given by the court on page 56, in the following language:

The net earnings rule contemplates a valuation upon the basis of the net earnings of the corporation which are attributable to its enjoyment of the special franchise. The method is thus applied:

- (1) Ascertain the gross earnings.
- (2) Deduct the operating expenses.
- (3) Deduct a fair and reasonable return on that portion of the capital of the corporation which is invested in tangible property.

The resulting balance gives the earnings attributable to the special franchise. If this balance be capitalized at a fair rate we have the value of the special franchise.

If this rule be applied in ascertaining the valuation of a railroad property as a whole, it is very simple. There is first required to be ascertained the gross earnings. From this amount the operating expenses, depreciation, and taxes are to be deducted. The resulting remainder gives the net earnings, which if capitalized at a fair rate give the true or actual value of the property.

The court does not, however, commit itself to this rule as applicable in all cases. It says on page 55:

There are obviously many cases, however, to which it would not be applicable. Take, for example, the case of a corporation enjoying a special franchise which by reason of mismanagement or other causes had yielded no earnings perhaps for many years; there it might be wholly contrary to the truth to hold that the special franchise of such corporation had no value simply because there happened to have been no earnings by which that value could be measured.

The foregoing six cases are the only New York decisions which need engage our attention. They cover a period of approximately forty years, and give a complete view of the judicial utterances during that time upon the point involved. In five of them the net earnings rule is adopted as the better and fairer basis of assessment, with a recognition in some of them that cost and reproductive cost may be resorted to for information and instruction.

The Clapp case, 152 N. Y. 490, is peculiar in that under the New York law as to the assessment of real property, the assessors of each town through which a railroad is constructed are to assess only the portion of the road lying within that town. They are not to assess the whole road. As I read the court's opinion, it confines the assessors in exercising their judgment to reproductive cost partly because of the insuperable difficulties attendant upon the application of any other method, and partly because the net earnings rule would allow them to assess franchises and other intangibles of great value which, as the court held, they 'have no power to include in the valuation of real estate'. The assessors had only the power to assess real estate, and the court debars them from the exercise of the net earnings rule for a reason concisely stated in the following language: 'The assessment of the real estate upon a basis of profits or income of the whole railroad must necessarily attribute to the real estate a value which should be shared with the personal property and franchises.'

Clearly, this case does not assist us in the least in determining the value of an entire railroad, including real estate, personal property, franchises, and all other elements, if any, which go to make up its value as a going concern.

Fixing value for the purposes of rate making has been discussed chiefly by the United States courts. The leading case in the United States Supreme Court on this question is *Smyth vs. Ames*, 169 U. S. 466, decided in 1898. It is unnecessary to analyze this well known case. It is, however, advisable to quote in full the celebrated statement of Judge Harlan as to the method of ascertaining value, which is as follows:

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.

This method of arriving at the 'value' of the property of a public service corporation has been very extensively cited as well as lauded in unstinted language. It demands analysis and study. The problem is stated by the learned court to be the ascertainment of the 'fair value of the property being used by it [the corporation] for the convenience of the public.' It then proceeds as follows, the language being divided by me for convenience of reference into numbered paragraphs:

And in order to ascertain that value

- (1) the original cost of construction,
- (2) the amount expended in permanent improvements,
- (3) the amount and market value of its bonds and stock,
- (4) the present as compared with the original cost of construction,
- (5) the probable earning capacity of the property under particular rates prescribed by statute,

(6) and the sum required to meet operating expenses,
are all matters for consideration *and are to be given such weight as may be just and right in each case.*

It will be observed that paragraphs numbered 1 and 2 are essentially the same, the only distinction between them being time of construction, and may be summarized briefly but correctly as *cost of property*. Paragraph numbered 4 is nothing more or less than *reproductive cost*, coupled with a suggestion that such reproductive cost should be compared with actual cost. Paragraph numbered 3 calls attention to the *commercial valuation* method of arriving at value. Paragraphs numbered 5 and 6 are only one way of stating *net earning* power as a basis of determining value.

Reduced to concise language and stated in terms having a well known and definite meaning, the court merely says that in determining value the matters for consideration include—

1. Cost of property;
2. Reproductive cost;
3. Commercial value;
4. Net earning power.

It does not limit consideration to these matters, but expressly recognizes there may be others, offering however no indication of what they may be. Merely pointing out what matters should be considered in the decision of a question, by no stretch of imagination can be treated as a rule for determination. We are told we should consider four well known theories for arriving at value, and such other facts as may be material or pertinent, and we are given no further aid except the suggestion that these matters should be given such weight as may be just and right in each case. In this last is the crux of the whole matter. It is beyond question, that if we make reproductive cost the test of value, a result will be reached in the great majority of cases different from that which would follow either from commercial valuation or from capitalization of net earnings.

This is undoubtedly the case in the comparison of any two theories. The capitalization of net earnings will rarely, if ever, produce the same amount as commercial valuation. If one of these methods is adopted in its entirety, such adoption necessarily excludes the others. If all are to be considered, what relative weight is to be given to each? We are justified in inquiring whether there is a definite and defensible principle which can be followed, or whether guesswork, speculation, and caprice are the determining factors in any given case. This is the really important point in the working of the so called rule, which analysis discloses not to be a rule but an enumeration of differing and, possibly, discordant theories to be considered.

If we are to call the language under consideration a rule, the test of its value must be found in its working in a concrete case. Taking the case in hand as a fair example, we find that we have no evidence as to the cost of the property, and it is a fair assumption from the facts known to us that to ascertain such cost with reasonable precision is impossible. The commercial valuation is an impossibility for the reason that the bonds and stock of the corporations which have owned the property never had any market value. The capitalization of net earnings cannot be considered, for in effect there have been no such net earnings. Reproductive cost can be approximated. If the value of property were always equal to reproductive cost, truly a happy state of affairs would exist. There could be no such thing as loss in venture, except from the depreciation by decay or wear of the property itself. A railroad could be built from nowhere to nowhere without business of any kind and yet its value would continue to be what it would cost to reproduce it. Clearly, the case of *Smyth vs. Ames* is not able to aid the Commission materially in the discharge of its duty in this case.

Since the decision in *Smyth vs. Ames*, valuation for the purpose of rate making has engaged the attention of the Supreme Court of the United States in various cases. In none of them, however, have I been able to find any complete and thorough-going discussion of the method of valuation which should be employed.

In the case of *San Diego Land and Town Company vs. City of National City*, 174 U.S. 739, the court used the following language.

The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use or upon some other fair and equitable basis. Undoubtedly all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to

demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed which went into the plant may be in excess of the real value of property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just, both to the company and to the public.

This language is subject to the remarks offered with reference to *Smyth vs. Ames*. It gives an enumeration of things which may be considered without determining their relative weight in the decision. It apparently assumes that what is 'fair and equitable' is something so plain that it requires no discussion. There seems to be a feeling that fairness and equity are matters which approve themselves to the ordinary mind without reasoning or investigation.

In *Cotting vs. Godard*, 183 U. S. 79, the same court used the following language:

As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which if enforced would amount to a confiscation of property. But it has not held affirmatively that the legislature may enforce rates which stop only this side of confiscation, and leave the property in the hands and under the care of the owners without any remuneration for its use. It has declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates.

In *Wilcox vs. Consolidated Gas Co.*, 212 U. S. 19, at page 41, the court recites the rule as to the validity of acts limiting the rates for gas, as follows:

The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just, both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * * * In order to determine the rate of return upon the reasonable value of the property at the time it is being used for the public, it of course becomes necessary to ascertain what that value is. * * * The value of the real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate when not based upon the actual cost of material and construction. Deterioration of the value of the plant, mains and pipes, is also to some extent based upon opinion. All these matters make questions of value somewhat uncertain; while added to this is an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction and the probable increased consumption, and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate.

It will thus be seen that as to the value of real estate owned by the gas company, in the case before the court there was no definite rule for ascertaining its value laid down. It was treated as a matter of opinion without indicating, so far as the case discloses, upon what particular fact or facts the opinion was to be based. But there was in the case the question of the value of certain franchises owned by the gas company. Regarding those the court said:

It cannot be disputed that franchises of this nature are property and can not be taken or used by others without compensation. The important question is always one of value. . . . But there is, however, no method of valuing franchises except by a consideration of earnings; earnings must be proportioned to assets; and both kinds of assets, tangible and intangible, must stand upon the same plane of valuation; having therefore a measure of growth of tangible assets from 1884 to 1905, the franchise assets must be assumed to have grown in the same proportion. . . . The franchises granted the various companies and held by complainant consisted in the right to open the streets of the city and lay down mains and use them to supply gas, subject to the legislative right to so regulate the price for the gas as to permit not more than a fair return, regard being had to the risk of the business, upon the reasonable value of the property at the time it is being used for the public.

In this case it was claimed by the gas company that the 'good will' of the business was property and entitled to be valued as such. Upon this point the court says, at page 52:

We are also of opinion that it is not a case for a valuation of 'good will'. The master combined the franchise value with that of good will and estimated the total value at \$20,000,000. The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the 'old stand' because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action.

It will not be found useful further to prolong quotations upon this subject. There is not to my knowledge, in any reported opinion, a thorough discussion of what constitutes value. Since the decision of *Smyth vs. Ames*, the courts have found it easy to resort to the sweeping general language used in that case as a rule for ascertaining value, when in fact no rule is given unless saying that everything may be considered without any intimation as to the relative weight and importance of different factors constitutes a rule. Simply naming a large number of unrelated particulars, or of inconsistent particulars, is not and cannot be an aid in the weighing of those particulars. Thus, the original cost of construction, and the present as compared with the original cost of construction, are both named as elements for consideration, with the remark, 'and are to be given such weight as may be just and right in each case'. As to what may be just and right in a given case is just the thing which we are in search of. The courts, in every instance, carefully refrain from indicating it. The same caution upon the part of the courts is manifested in the taxation cases. In the *Jamaica Water Supply Company* case, 196, N. Y., at page 51, the court says:

In our opinion it is beyond the province of the courts to lay down an exclusive rule of franchise valuation applicable to all cases. . . . It is conceded, however, that there are many reasonable methods.

Such a concession as this, to wit, that there are many reasonable methods of getting at the true value of a special franchise, does not seem to have been made in the case of *Wilcox vs. Consolidated Gas Company*, where, as before shown, the court said:

But there is, however, no method of valuing franchises except by a consideration of earnings.

It is not believed that any useful result will be gained by further consideration and analysis of decisions of the courts. Enough has been quoted to show that vigorous statements have been made in favor of the rule of commercial valuation, in favor of the rule of net earnings, and in favor of all the leading theories of

valuation. That each statement must be weighed with reference to the facts of the case before the court is unquestionably true. It is clear that no general rule for valuation applicable to capitalization cases has been evolved, and hence none that is authoritative and controlling.

The diversity of judicial opinion as to the rule for determining the value of a complex property used as a unit in the public service, for the purposes of taxation and the fixing of rates, apparently leaves the Commission free to investigate as to the proper method to be pursued in capitalization cases. This view is supported by the extreme care manifested in judicial deliverances to make it clear that the method approved in the case before the court may be unsuited to other cases and circumstances. It is, perhaps, not too much to say that the failure of the courts to analyze carefully the problem has left the situation obscure upon principle.

What constitutes 'Value' :

The different senses attributable to the word 'value' do not seem to have been carefully discriminated, with the result that one court apparently speaks of one thing while another has in mind something materially different. It is essential at the outset of any discussion of the subject to ascertain and define with accuracy just what is the exact signification of the term 'value'. Unless we know precisely what we are to seek, the method of seeking will most likely be defective.

There can be no question that 'value,' with reference to the purposes of taxation, fixing of rates, and capitalization, means value in exchange. This was clearly brought out by Adam Smith nearly a century and a-half since, and has remained a recognized truth with all economists since his day. John Stuart Mill, in his *Political Economy*, makes the clear cut statement, 'Value, when used without an adjunct, always means, in political economy, value in exchange or exchange value'. This distinguished writer makes the following observations, which are quoted as full justification for all the attention to the proper definition of value which it is proposed to give at this time:

Almost every speculation respecting the economical interests of a society thus constituted, implies some theory of value: The smallest error on that subject infects with corresponding error all our other conclusions, and anything vague or misty in our conception of it creates confusion and uncertainty in everything else.

One of the most acute and profound writers on Economics, W. S. Jevons, used language which is believed to be unassailable as to accuracy of principle; and which deserves to be quoted at length. He says [*Theory of Political Economy*], page 77:

Now if there is any fact certain about exchange value, it is, that it means not an object at all, but a circumstance of an object. Value implies, in fact, a relation. A student of Economics has no hope of ever being clear and correct in his ideas of the science if he thinks of value at all as a thing or an object or even as anything which lies in a thing or an object. Persons are thus led to speak of a nonentity as intrinsic value. There are, doubtless, qualities inherent in such a substance as gold or iron which influence its value; but the word Value, so far as it can be correctly used, merely expresses *the circumstances of its exchanging in a certain ratio for some other substance.*

He further says, at page 78:

Value in exchange expresses nothing but a ratio, and the term should not be used in any other sense. To speak simply of the value of an ounce of gold is as absurd as to speak of the ratio of the number seventeen. What is the ratio of the number seventeen?

Of so great danger did he conceive the ambiguities lurking in the word 'value' to be, that after sharply calling attention to what he terms 'the thoroughly ambigu-

ous and unscientific character of the term value,' he remarks: 'In spite of the most acute feeling of the danger, I often detect myself using the word improperly; nor do I think the best authors escape the danger.' It may be well to note that this is just what happens in at least some of the judicial utterances based on the use of this word. They use it in what are really different senses.

To make this point clear beyond the chance of mistake, it is well to illustrate it somewhat further. The air we breathe is indispensable to our existence and hence has the highest possible value in use. When we consider it as a utility, its value can not be expressed in terms. It has, however, no exchange value whatever: that is to say, in the ordinary experience of mankind no occasion arises when one will part with some other thing which he possesses in exchange for it. It would be absurd to speak of the value of air in connection with the matters we are discussing, however useful and indispensable it may be to us. Anthracite was known for a considerable time before its use was understood. It possessed every quality then which it now possesses, but it was to mankind a useless black stone and had no value, that is, no one would exchange any money or other commodity for it. Its properties becoming known, people desired to possess it because of those properties, and in order to gain such possession were willing to exchange other things which they possessed for it. The amount of such other things which they will give in exchange is the ratio of the exchange, and such ratio is the value of the anthracite. We may select almost any article of human use or consumption which under ordinary circumstances has exchange value, and a slight change in circumstances will deprive it of exchange value although its utility remains precisely as before. A speedily perishable article, *e. g.* peaches, taken to a great city market, will, under ordinary conditions of demand and supply, exchange in a certain ratio for money, and this ratio or price is its value. Over supply the market, and the excess beyond what is required to satisfy the demand becomes absolutely valueless and is cast away as worthless. The article remains the same. The value disappears for the simple reason that no one is willing to exchange anything for it. The homely speech of the people expresses roughly the same truth that is contained in the most precise and elaborate reasoning of economists when they say, 'A thing is worth what it will sell for.'

Without pressing the matter unduly, we may say that value is nothing intrinsic in things, but simply the temporary measure of the general average desire for them at the moment. It is subjective, inherent in the mind which conceives it and not in the object of which it is conceived. The qualities of an object make it an object of desirability to those who have it not and who can not acquire it without parting with something which they have in exchange therefor. The terms on which the exchange is made constitute the ratio of exchange. This ratio is ultimately fixed by demand, and demand is determined by the intensity of desire.

These statements of well settled economic truths are dwelt upon for the purpose of bringing out clearly the fundamental truth that when we inquire concerning the value of a thing in the sense of that term with which we are concerned, our inquiries do not primarily relate to the thing itself or its properties or qualities, but should be directed to the strength of the desire which others than the owner may have for its possession, and which desire is ready to manifest itself in parting with money or other things in order to obtain the coveted thing. The properties or qualities of the thing may, and in most cases undoubtedly should, be taken into consideration in estimating the probable intensity of desire for its possession. They are or may be evidence throwing light upon the subject under investigation but they are not the thing sought. If a promoter were to ask to capitalize the air in his electric generating station on the ground of its great and indispensable value in connection with the operation of the plant, the fact upon which he relied would have to be conceded. It would be as necessary and indispensable as the generator or steam engine. It, however possesses no exchange value: that is, no one would part with any other thing to obtain it, for the good and sufficient reason that it can be obtained without parting with anything.

The simplest inquiry which can be made concerning exchange value or ratio of exchange is that which relates to market value. The term 'market value' presupposes that a thing either is transferred from one to another frequently or that it is one of a class which is being constantly transferred, so that by inquiry we may learn the ratio of exchange in these cases and hence conclude that the particular thing can be exchanged at that ratio, or substantially that. This makes an inquiry into the market value of a thing an inquiry into the ratio of exchange which prevails with reference to similar things. If we wish to ascertain the value of a bushel of wheat, we inquire how strong is the desire of men generally for wheat as evidenced by their willingness to exchange money or other things for it. The utility value of a bushel of wheat is constant and practically knows no change. The exchange value fluctuates constantly. This means that the intensity of desire for the possession of wheat as compared with the intensity of desire for other things varies from day to day, and hence the market fluctuates.

These considerations lead us directly to the crux of the whole matter, which can not be too clearly stated or carefully considered.

An inquiry into the value of a railroad property as a whole is an investigation of the question how much will any person or collection of persons desire to possess the property, and how much of money or other things will they be willing to part with for the sake of such possession. The difficulty attending the investigation is: (1) the property has never been, we will assume, bought or sold, so that there is no direct test or evidence of its ratio of exchange for money or other things; (2) it is not one of a class of things which are bought or sold with such frequency or under such circumstances as to afford a fair test of what it would be likely to bring upon exchange or sale.

In short, no direct evidence is obtainable concerning its probable ratio of exchange. The only course open to the investigator is to select those qualities or attributes which in his judgment would create a desire for the property, and then estimate how much that desire would induce a prospective purchaser to surrender for its satisfaction. Different standards for judging of value in this way have been used for the reason that men differ as to what would create the desire for possession and as to its strength measured by desire for other things.

If the inquiry is as to the ratio of exchange of a work of art, the considerations determining such ratio will be found to be of a nature materially different from those controlling in the case of a railroad. The price paid for a site for a home is determined in the mind of the purchaser by reasons which are wholly different from those obtaining the purchase of a site for a factory. In buying a railroad or any interest in a railroad there is no play of sentiment or gratification of an æsthetic desire. There is no feeling which actuates the purchaser except the desire of gain. If the purpose is an investment, the matters which appeal to the purchaser and determine the ratio at which he will exchange his money or property therefor are the security of the investment: that is, whether he can at some future time dispose of his interest without loss of principal or at a profit, and the amount of return which he is likely to receive by way of dividends or interest. The purchase may be made for speculative purposes, that is, to sell again after an indefinite interval for a profit. The sole motive is gain, and the calculations in such case are based upon the belief that others will be ready to give more than the price for which it is now obtainable. The purchase may be made by another railroad corporation, or those interested in another existing railroad property, for the purpose of controlling business, providing greater facilities, reaching new fields of profitable business, or doing away with a ruinous competition. In all these cases the motive is gain. Analyze every possible case, and in every one it will be found that an intending purchaser is influenced solely by the desire of gain. No one wants a railroad or any interest in it for any other purpose. In some form or another the impelling motive for the purchase is to get money either by selling again at a profit, or by dividends, or interest, with a belief that a sale can be made at as much or more than the purchase price. These

are truisms, but they need statement in order to bring out clearly the fundamental truth that in seeking to ascertain the value of a railroad property we must inquire into what power it possesses, or is believed to possess, to give gain to a purchaser. It is not a thing which one desires to have for its own sake, like a work of art. It is without any attraction in itself. Its one characteristic which gives it value is its supposed power to yield, directly or indirectly, a money return equal to the investment with a profit thereon. Its value lies, not in what it is, but in what it will produce or what is believed it will produce in money. This is the essential proposition upon which all depends.

Generally speaking, what it will produce in money depends upon its earning power, direct or indirect. To the ordinary investor it is its direct earning power as shown by the excess of its revenues over its expenses. To another road it may be indirect by furnishing business upon which a profit can be made, or by the suppression of a destructive competition. To the speculator, or, perhaps, more accurately, stock gambler, results in many cases are not to any appreciable extent dependent upon the road itself, or its earnings, but upon other conditions which may not be analyzed here even if it were possible.

The variation in market value of the common stock of seven large lines during three selected years was as follows:

	Highest.	Lowest.	Per cent variation.
New York Central.....	147·750	93·750	57·5
Pennsylvania.....	151·250	106·500	42·0
St. Paul.....	165·125	98·500	67·6
Northern Pacific.....	159·500	100·500	59·0
Southern Pacific.....	139·125	63·250	120·0
Union Pacific.....	219·000	100·000	119·0
Reading.....	173·375	70·500	145·0

Translating these percentages into terms of money, we get the following:

	Amount of stock.	Value at Highest.	Value at Lowest.	Variation.
New York Central.....	\$178,632,000	\$263,928,780	\$167,467,500	\$ 96,461,280
Pennsylvania.....	401,064,800	606,610,510	427,134,012	179,476,498
St. Paul.....	116,348,200	192,119,965	114,602,977	77,516,988
Northern Pacific.....	248,000,000	395,560,000	249,240,000	146,320,000
Southern Pacific.....	272,402,600	378,980,117	157,644,300	221,335,817
Union Pacific.....	199,302,300	436,472,037	199,302,300	237,169,737
Reading.....	70,000,000	121,362,500	49,350,000	72,012,500

It is apparent that such fluctuations as these do not follow fluctuations in the earning power of the roads or any changes in their physical condition. The constant fluctuations between the maximum and the minimum prices, which are well known, emphasize this view which need not be further dwelt upon.

Certain stocks, of which Erie common is a typical case, which declare no dividends and yet have a considerable market value, should not be overlooked. The Erie Railroad Company was incorporated in 1895. Its common stock, now amounting to \$112,378,900, has never received any dividend. Its first preferred has paid dividends during five years, and second preferred during two years. No dividend on either has been paid for the last three years. Both classes of preferred stock amount to \$63,892,400. For the fiscal year ended June 30, 1908, the company failed to earn enough above operating expenses and taxes to pay its fixed charges by \$1,631,887. Yet during all this time the common stock has had a market value

reaching at times as high as 35. This curious history is instructive in demonstrating that plausible generalizations as to value should not be exempt from searching analysis.

Any consideration of earning power must have in view past, present, and future. It is common experience that earnings of some roads increase, others remain stationary or diminish. Growth of the country served involves growth of business. Competition of new roads may for a time outrun the growth of the country. Sources of traffic, for a time lucrative, may after a time disappear. The Buffalo and Susquehanna traverses a timber region and its principal haul has been lumber. It is known that the timber of this region will be practically exhausted in four or five years and this part of the road's business will be substantially lost. An effort has been made to meet this situation by extending the road to and developing coal mines. What the result will be on the general fortunes of the property, time alone can tell. Within recent years local passenger traffic at points upon the New York Central has been practically annihilated by the construction of parallel electric roads. The loss of profits entailed by this diminution of business decreases to some extent the value of the road. The diminution may, of course, be offset by a growth in other business.

Roads doing a large coal carrying business must at some time face the loss of that business by the exhaustion of the mines. The Delaware and Hudson Company, about 60 per cent of whose freight business is the hauling of coal, has this event in mind, as shown by the purchase of undeveloped mines located a considerable distance from its road.

Certain lines of railroad formerly did a large and profitable business in hauling petroleum, which business was ultimately largely destroyed by the construction of pipe lines. The exhaustion of oil fields has wrought havoc with the value of railroads which at one time were profitable.

It may be well to illustrate somewhat more in detail the factors which give value to a railroad, that is to say, those things which make it attractive and induce the public to part with its money in exchange for its stocks and bonds. An instructive comparison may be made between two steam railroads subject to the jurisdiction of this Commission: the Delaware and Hudson, and the Buffalo and Susquehanna. The stock of the D. & H. is selling around 172; for that of the B. & S. there is no market. The D. & H. declares 9 per cent dividends. The B. & S. has been facing a yearly deficit of approximately half a million dollars, and within two years has gone into the hands of a receiver. The great difference in the values of the two roads does not lie in the difference in cost of reproduction, since mile for mile upon this basis it is a fair assumption they are of approximately the same value. Some of the factors which make the one valuable and the other comparatively valueless are shown in the following data as to their operations for the year ended June 30, 1908:

FREIGHT.

	D. & H.	B. & S.
Train miles per mile of road.....	6,656	2,372
Ton-miles per mile of road.....	2,727,000	698,000
Revenue per ton carried.....cents	85	80
Revenue per mile.....\$	19,090	4,710
Freight car-miles per train-mile.....	16.28	8.18

PASSENGER.

	\$ cts.	\$ cts.
Revenue per train-mile.....	1.07	0.51
Revenue per passenger-mile.....	.0242	.0263
Revenue per mile of road.....	3,880	600
Operating revenue per mile.....	23,240	5,430
Operating ratio, per cent.....	68.54	91.69

The difference between financial success and financial failure lies, as shown by these figures, in density of traffic. The value of an existing road depends directly upon such density and not upon the cost of the road. If cost were the factor which determined the ratio of exchange, it is probable that there would be but little difference between the value of the two roads, mile for mile.

The cost of reproduction may be a very material factor in the fixing of value owing to the fact that it may have an extremely potent influence upon the earning power. A railroad which has nearly reached the point where it must have a renewal of ties, rails, bridges, rolling stock, stations, in short must be practically rebuilt, may so long as the old plant can be kept in service be able to produce as great net earnings as a new plant. For a given year the nearly wornout road may be as profitable as one in perfect condition. Owing, however, to its shorter lease of life, it would not be as valuable for continuous earning, which is the thing to be considered.

Obsolescence is another factor which can not safely be overlooked. It has played a tremendously important part in electric plants during the past twenty years. Many a piece of machinery has been consigned to the scrap heap which was practically as good as new, but which, in the judgment of the management, had become valueless except as scrap because of the advantage of using an improved machine to do the same work. Locomotives too light in tractive power, freight cars of too small tonnage, passenger cars of antique pattern, against which the public demur although they may be safe and strong, obviously have not a value equal to reproductive cost.

It is unnecessary to pursue this discussion further. In cases where the sole attraction of a property which gives it exchange value, or in other words creates a desire for its ownership, is pecuniary gain, the measure of the desire and hence of the ratio of exchange is clearly the amount of gain which it is believed can be realized. This fundamental consideration indicates that the net earnings rule of valuation, when properly and carefully applied with due regard to all the features of the individual case, is probably the one having the surest support of basic principle. It is also the one which accords with the practice of shrewd, broad minded, successful men of business.

A few observations may be pertinent upon other features of valuation. Regarding the commercial valuation theory, it is sufficient to say that it is wholly inapplicable to a case like the present one, for the reason that the stock and bonds of the company which owned and operated this road have not now, and so far as we know never have had, any market value whatsoever. The facts, therefore, upon which commercial valuation is based are entirely wanting.

Reproductive cost requires, perhaps more attention. It should first be noted that there is a clear and broad distinction between capitalization authorized for new construction in which stock and bonds are to be issued for money and the money expended for materials and labor, and capitalization authorized to purchase completed construction. In the one case stock and bonds are issued in exchange for a definite amount of money which is the standard of value, and which at any and all times has a definite although it may be varying exchange value. The money thus obtained, it is true, is to be invested in materials and labor, but it would hardly correspond with the fact to say that the assembled product is of the value of the money expended. In fact, it is rarely if ever of that precise value. Bankers never loan upon cost alone. Purchasers never buy upon its sole basis. Cost is a matter of the past and an accomplished result. The investor and the purchaser look to future results for the attractive features which induce their decision as to the amount they will loan or the price they will give, which is the real test of value. Whether the article or the construction procured by the money obtained by the sale of stock and bonds is worth as much as the money depends upon many circumstances. It may be wrongly located as to traffic, it may be mismanaged, it may be superseded by improvements, it may be ruined by competition: all of these matters must be considered in arriving at its value. In such capitalization, fluid or floating capital is converted into fixed capital. It is not the same, but always different after the conversion. As fixed capital it may

be more or less attractive to others than the fluid capital would have been. It is rarely the same.

For these reasons this Commission has repeatedly felt compelled to sound a note of warning that authorization of stock or bonds which are to be sold for money, and the money invested in property, does not indicate that the security afforded by the stock and bonds will be good. Such authorization cannot go any further than to indicate that the Commission has exercised all possible care to see that the proper amount of money has been realized upon such stock or bonds; and whether the money is well used or otherwise, whether the investment proves productive or non-productive, is something entirely beyond the control of this Commission and must depend upon the wisdom, foresight, and judgment of the controlling officers of the corporation. The fact that the property in which the money is to be invested, either by construction or purchase, may not be of the value of the money, is what differentiates the present class of capitalization from the class under discussion. In capitalizing an existing railroad the Commission must, so far as lies within its power, say what is the fair value of the railroad itself. If it takes reproductive cost only to be that value, it goes contrary to all experience and all the sound canons of judgment. A lighting plant constructed in the middle of a desert would have no value as such, for the reason that there would be no one to pay the rate or require the service.

If a railroad company has erected at one hundred stations along its line, station houses costing fifty thousand dollars each, while houses costing five thousand dollars each would have been ample and adequate, and five thousand dollars is all that the business at each station would pay a fair return upon, it is obvious that forty-five thousand dollars have been sunk in each station. The reproductive value of the stations would be five million dollars, and the actual value of the stations as measured by earning power would be only five hundred thousand dollars. Reproductive cost may differ from the real value by reason of being out of proportion to the volume of business requiring the services of the property to be valued, or by reason of being of such cost that the business cannot afford to pay enough to yield a return upon the amount expended. If a hotel building be erected at great cost with a view to renting, the value of the building is determined primarily by the rental which it will earn. The value is the sum upon which it will return a given percentage of revenue. A person contemplating the erection of such a building makes his calculations upon this basis. Those calculations at the time they were made may have been sound. If so, the building is worth what it cost, since it yields the anticipated returns upon the cost; but, as frequently happens, the return given is so attractive that a competitor steps in. The newer building is a little more favorably located, has more modern improvements, or for some other reason obtains greater favor with the public. At once the revenue of the first building decreases, and instead of getting the percentage of return which was expected, produces a less amount. The value of the building at once diminishes, that is to say, a willing purchaser will pay for it only the sum upon which it will yield to him what he considers to be an adequate return. If he can loan his money at 5 per cent, the building must return to him at least 5 per cent net or he will not buy. The reproductive cost is precisely the same whether the rental returns be great or small. What the property will sell for in market, which constitutes its exchange value, depends upon the rental which can be obtained and not upon the cost or reproductive cost. Such considerations need not be enlarged upon. It is sufficient to say that the reproductive cost is not the one element which makes property attractive to an intended purchaser. The attraction lies in the returns which it will afford.

Legislation rule for fixing value:

The Legislature has very recently determined the rule for fixing the value of property involved in reorganizations of insolvent corporations. By amendments to the Public Service Commissions Law it was declared that the Commission shall determine the amount of capitalization of corporations reorganized under and pursuant to sections 9 and 10 of the Stock Corporation Law, and the amount of the

capitalization shall not exceed the fair value of the property involved. The value of the property is to be ascertained by 'taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates, and all other relevant matters'. The language quoted is from new sections 55a, 69a, and 101a, and definitely determines, so far as the property of reorganized corporations is concerned, that all of the aforesaid matters may be taken into consideration by the Commission required to determine the value.

This rule established by the Legislature for determining value in one class of capitalization cases can well be extended to all capitalization cases coming before the Commission.

Elements for determining value which are present in this case:

The evidence in this case and the records of the Commission place before us the following matters from which we are required to determine the value:

1. Reproductive cost less depreciation.
2. Past earning power of the road, with a general knowledge of the prospects for future growth and business.
3. Price which the property realized at open competitive sale.

These several matters will now be considered.

Reproductive cost less depreciation:

On the hearing, the Commission insisted that it should be advised as to the reproductive cost of the property purchased upon the foreclosure and sale. The applicant, therefore, caused an appraisal to be made by employees of the well known firm of Westinghouse, Church & Kerr Company. The inventory and appraisal are very extensively detailed. The engineer in charge of the same was sworn as a witness and a summary of his evidence is as follows:

Total duplication cost.	\$862,839 31
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He divided the property so valued into that which was not subject to depreciation and that which was subject to depreciation:

Property not subject to depreciation.	\$ 26,736 00
Property subject to depreciation.	836,103 31
<hr/>	
Total.	\$862,839 31

He estimated the depreciation to be \$183,271.48, so that the reproductive cost of the property subject to depreciation he estimated to be \$652,831.84, making a total reproductive cost of \$679,567.84.

There was, however, a very serious reason to believe that in this appraisal the property had not been sufficiently depreciated. The cross-examination of the witness disclosed that he was unwilling to depreciate property more than 60 per cent so long as it was capable of remaining in service. A very considerable amount of evidence was given showing that the condition of the property was extremely bad. A part of the application was for an authorization to issue bonds to be devoted almost wholly to the construction of replacements. One of the applicants witnesses stated that the general condition of the road from one end to the other was 'pretty well run down. The whole road was in the same condition. The overhead construction was poor, just about the same as the rails and joints; the whole thing was, some parts of it, exceedingly poor. The wire was all poor, all in a general run down condition.'

Subsequent to the first hearing, the company found it necessary to reconstruct the entire line from Mamaroneck to White Plains; and, as we are advised by our engineer, some of the old material was worthless even for junk. Under these circumstances, at a hearing held August 31, 1911, it was arranged that a re-valuation of the road as to its reproductive cost, less depreciation, should be made by the

engineers of the company and the engineer of the Commission. After prolonged investigation they have agreed upon results which will be accepted. These amounts relate to the value of the property as of December, 1909. It is unnecessary to enumerate the details. Their conclusions are as follows:

Power and car equipment.	\$237,739 98
Track and way.	207,954 00

Total reproductive cost less depreciation, December, 1909. \$445,693 98

This result having been reached by the applicant's own engineer, who had been engaged in reconstructing the road, it is unnecessary to comment upon it further; and it, of course, so far as reproductive cost less depreciation is concerned, must be treated as binding upon the applicant.

Earning power of the property:

The earning capacity of the former Tarrytown, White Plains and Mamaroneck railroad, as demonstrated by actual results, is shown in the following table compiled from the reports of the company and its receiver to this Commission. The earning power of that portion of the road purchased by the applicant herein is also shown in the table from the period the applicant took possession down to the close of the fiscal year ended June 30, 1911. During the fiscal year ended June 30, 1910, the road was, up to December 7, 1909, in the possession of and operated by a receiver. For the remainder of the year it was operated by the applicant.

Year.	Miles operated.	Operating revenue.	Operating expenses.	Net operating revenue.	Taxes.	Operating income.	Non-operating income.	Gross income.	Rentals.	Net income available for interest and dividends.	Operating ratio, percent.
		\$	\$	\$	\$	\$	\$	\$	\$	\$	
1896.	5·12	89·81	18,032	9,050	.....	9,050	.....	9,050	.....	9,050	200·77
1897.	7·87	15,314	18,764	3,449	.....	3,449	.....	3,449	.....	3,449	122·50
1898.	9·37	18,273	21,277	3,004	73	3,077	.....	3,077	.....	3,077	117·00
1899.	14·50	39,172	34,421	4,751	1,048	3,703	.....	3,703	.....	3,703	87·87
1900.	17·86	49,701	36,973	12,728	1,794	10,934	.....	10,934	.....	10,934	74·67
1902.	18·69	62,261	56,284	5,977	1,949	4,028	.....	4,028	.....	4,028	90·73
1901.	18·69	65,736	63,231	2,505	1,947	558	.....	558	.....	558	96·51
1903.	20·05	72,933	76,343	3,410	2,193	5,603	.....	5,603	.....	5,603	104·95
1904.	25·33	95,057	93,759	1,318	2,382	1,064	.....	1,064	.....	1,064	99·08
1905.	26·86	106,879	100,046	6,833	2,467	4,366	.....	4,366	.....	4,366	93·65
1906.	26·86	128,548	113,445	15,103	2,666	12,437	.....	12,437	.....	12,437	88·39
1907.	22·83	132,336	144,085	11,699	2,723	14,422	.....	14,422	.....	14,422	108·80
1908.	22·76	137,995	162,734	24,740	2,874	27,614	163	27,451	.....	27,451	117·92
1909.	22·76	144,768	186,487	41,719	3,035	44,754	161	44,593	.....	44,593	128·82
1910 (a) ..	22·76	80,355	78,441	1,914	1,446	468	374	842	812	30	92·49
1910 (b) ..	22·76	92,513	75,270	17,243	3,444	13,800	151	13,950	8	13,942	81·30
1910 (c) ..	22·76	172,868	153,711	19,157	4,890	14,268	425	14,792	820	13,972	89·00
1911.	27·16	223,585	177,856	50,728	9,437	41,292	284	41,575	22,692	18,883	77·80

(a) Receiver's report, July 1, 1908, to December 7, 1909.

(b) Westchester St. R. R. Co.'s report, December 8, 1909, to June 30, 1910.

(c) Combined figures of receiver and reorganized company covering entire year 1910.

The foregoing table requires but little comment or explanation. It is incorrect in the particular that it discloses only taxes actually paid, not those levied and assessed for which the company became liable and which it should have paid. A very large amount of unpaid and back taxes, aggregating \$47,450.78, has been paid by the applicant, which if included in the table would further increase the deficit. The road as a whole, before it came into the possession of the applicant, was a bad loser, saying nothing of depreciation and unpaid taxes. The net deficit, exclusive of the depreciation, unpaid taxes as stated, and fixed charges, for the period 1904-

1911, both inclusive, was \$37,872. Since the road has been in the possession of the applicant there has been a marked improvement in gross earnings. This improvement, however, requires some consideration, for in part it arises from a situation which should be detailed with care.

Rate of fare between Mamaroneck and White Plains:

On the 2nd day of March, 1898, the Village of Mamaroneck granted to the Tarrytown, White Plains and Mamaroneck Railway Company a franchise to construct its road through that village. In and by the terms of such franchise the road was permitted to charge a maximum fare of ten cents for transportation from the village of Mamaroneck to the village of White Plains, a distance of approximately seven miles. In pursuance of the terms of this franchise the road was constructed through the village of Mamaroneck, and the franchise itself was sold upon the foreclosure sale to Sutro and is now owned by the applicant. Afterward the company desired to construct a branch line from a point in the village of Mamaroneck upon its line just mentioned, southwesterly through the village into the town of Mamaroneck, and through the town of Mamaroneck to the easterly line of the village of Larchmont, a distance of a little upward of one mile. On the 3rd day of February, 1899, the Town of Mamaroneck granted to the Railroad company a franchise permitting the use of the Boston Post road for the construction of its branch, but annexed to the franchise was a condition that the company should transport passengers from the easterly line of the village of Larchmont over its line to the village of White Plains for the maximum fare of five cents. Afterward, and on the 25th day of October, 1899, the Village of Mamaroneck granted a franchise for the construction of this branch through the portion of the village of Mamaroneck required for such purpose, along the Boston Post road, and annexed a condition to this franchise similar to the one embodied in the franchise granted by the Town of Mamaroneck. The branch line was constructed pursuant to this franchise, and has been operated upon the terms imposed down to the time the applicant took possession of the road from White Plains to Mamaroneck. It then commenced to charge as the fare from White Plains to Mamaroneck the sum of ten cents, and continued to charge that fare during all the time covered by the foregoing table.

The applicant claims that by reason of a certain provision in the judgment of foreclosure and sale, and by reason of certain proceedings taken pursuant to such provision, that it acquired the line from Mamaroneck to White Plains free from the conditions and obligations of the franchise relating to the branch from Mamaroneck to Larchmont, and that it was entitled to charge said sum of ten cents. Complaint was made to this Commission that the applicant was violating its franchise in charging said sum of ten cents, and after considerable negotiation and discussion it was finally arranged that this Commission should bring a proper proceeding in the Supreme Court against the applicant to procure a judgment requiring it to charge only the sum of five cents. This proceeding was in fact brought upon a complaint which was practically agreed to by the Commission and the applicant, with the understanding that a demurrer should be interposed by the applicant in order to raise the legal question upon which it relied. Such demurrer was interposed and was overruled by both the Special Term and the Appellate Division of the Supreme Court, which held that the applicant was bound by the provisions of the two franchises restricting the fare to the sum of five cents, notwithstanding the clause or provision in the judgment of foreclosure and sale upon which the applicant relied as freeing it from the burden of these conditions. Thereafter the applicant availed itself of the privilege of answering the complaint. It did not deny any substantial averment of the complaint, but set up in substance the oppressive nature of the condition and the ruinous financial results which would follow from its enforcement. The case was tried before the Special Term upon those averments. It was alleged in the answer and proved by the applicant upon the trial that the enforcement of the five-cent fare operated very disadvantageously to it. The following are the financial results as given in the evidence and upon which it relies.

The total passenger revenue received by it upon the line from White Plains to Mamaroneck from December 8, 1909, to September 11, 1911, inclusive, was \$96,922.15. The operating expenses, estimated upon the basis of car mileage as compared with the car mileage and operating expenses of the entire road, were \$84,583.65, leaving a net revenue at the ten-cent rate of \$12,338.50, or a net revenue per car-mile of \$0.0308. It claims that if the five cent fare had been charged, instead of ten cents, assuming that the number of passengers would have been the same, the passenger revenue would have been only \$78,506.94, thus making a deficit in operating the line of \$6,076.71, or a deficit per car-mile of \$0.0151. In short, its contention is that for the period named, from December 8, 1909, to September 30, 1911, the enforcement of the condition of the franchises would have turned a net revenue of \$12,338.50 into a deficit of \$6,076.71.

The effort of the applicant to free itself from the burden of the conditions in these franchises is conclusive as to its view that the existence of these conditions in the franchise causes a serious diminution in the value of the property, and no further argument is needed to demonstrate that such is the case. This proposition was conceded by the applicant at various times during the hearings. It practically conceded that no one could tell how much the property would be worth if the franchise conditions are valid and binding upon it at the present time. It also conceded that the value of the road would be very much less than it would be without such conditions restricting its rate of fare.

The trial court decided the case, holding the franchise valid and denying the company relief from its provisions. This judgment has been affirmed by the Appellate Division. We must assume in view of the judgment of the court that the franchise conditions are binding, and treat them as a circumstance of considerable importance in determining the value of the property.

Price realized for property at open competitive sale:

A sale of the entire property of the Tarrytown, White Plains and Mamaroneck Railway Company was had pursuant to a judgment of foreclosure and sale on the 5th day of November, 1909. The judgment of foreclosure directed that the road should first be offered for sale as a whole, then should also be offered for sale in three parcels. Pursuant to such direction, the road was first offered for sale in its entirety and the only bid received therefor was the sum of \$450,000. The referee then offered for sale parcel No. 1 as described in the judgment, and a person representing what may be termed the Third Avenue Railroad Company's interests bid for this parcel the sum of \$240,000; Mr. Sutro, acting for the New Haven company, bid \$460,000; there being no further bid it was provisionally sold to Mr. Sutro. Parcel No. 2 was then offered for sale, and the bidding between the New Haven interests represented by Mr. Sutro, and the Third Avenue interests represented by Mr. Middlebrook, was sharp and active, there being twenty-eight bids by each party, and the property was finally struck off to Mr. Sutro for \$365,000. Parcel No. 3 was then offered for sale, and after some fourteen bids it was struck off to the Third Avenue interests for \$110,000.

The court confirmed the sales in parcels, so that parcels Nos. 1 and 2, the property sought now to be capitalized, were sold to Sutro for the sum of \$825,000. Such purchase was also subject to the payment of other matters: being unpaid taxes, unsettled tort claims, and the like. So far as parcel No. 2 is concerned, the sale was undoubtedly sharply competitive. The bidders had been authorized by their respective principals to get the property as best they could up to a certain maximum limit. It is necessary to review the evidence showing that the competition was real. That it was such may be found as a fact from the evidence.

It does appear, however, that at the time of the sale the New Haven road at least, and probably the other bidder, supposed that the property was freed from the burden of the franchise condition. It does not appear that any investigation had been made

as to the earning power of the road by either party, and it does not appear that any inventory and appraisal of the road had been made, or any competent engineering estimate made as to its reproductive cost and depreciation. It was undoubtedly known to both parties that the road had proved a financial failure, that it had been in the hands of a receiver, and was unable to pay operating expenses at that time.

It is more than probable that, although there is no direct evidence to such effect, the bidders considered the franchises of the company which were acquired, of value, and were willing to pay for them. The road occupies public highways. Section 55 of the Public Service Commissions Law forbids the capitalization of any franchise to be a corporation and the capitalization of any franchise, or the right to own, operate, or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof as a consideration for the grant of such franchise or right.

This provision excludes all franchise valuations from consideration in this case, and to the extent, if any, that the applicant has seen fit to pay for the franchises as a part of the value of the property, to that extent capitalization by stock issue must be denied.

Prospective earnings of the company:

As hereinbefore indicated, the probabilities regarding the future earnings of the property are of the highest importance in determining the value of the property, and it therefore becomes essential to forecast to some extent the prospective earnings of the applicant.

Referring to the table showing its earnings for the entire period of operation, we find that in 1904 it had substantially reached its development in mileage. The length of the road that year was 25.33 miles. The length of the road owned by the applicant is now something over 22 miles, but it operates some miles of track owned by another company so that its total mileage operated in 1911 was over 27 miles. The total operating revenues for the years named were as follows:

1904	\$ 95,057
1905	106,879
1906	128,548
1907	132,386
1908	137,995
1909	144,768
1910	172,868
1911	228,585

This, of course, is a very substantial, if not remarkable, increase in operating revenues. Unfortunately, the increase in operating expenses has generally kept pace with the increase in operating revenues. Just why this should be so is not disclosed by any evidence, but it is very clear that until the road went into the hands of a receiver it was badly managed and that the receiver had to contend with an extremely bad situation. After the road came into the hands of the applicant the operating ratio for the year 1911 was 77.80. With the improvements which the applicant is making on the road, and with the general efficiency of operation which ought to accrue from good management, this operating ratio should be reduced very considerably, which would make an improvement in net income even without increase in operating revenues. There is, however, every reason to believe that the operating revenue will continue to increase. It may well be supposed that the operation of the New York, Westchester and Boston railroad from White Plains to New York, with a proper connection between the two roads at White Plains, will increase the business upon the line between Tarrytown and White Plains to a considerable extent. The

general growth of that portion of Westchester county through which the road passes ought to increase the density of traffic and diminish the operating ratio.

There is, of course, no way of figuring these matters, mathematically. They are simply matters of judgment based upon experience, and it is our judgment that under good management the road can be made to pay some returns. If it were to continue for the next ten years the history of the past ten years, it could not be said that the road had any value whatever, since it has up to within the last year been a source of loss only.

It must not be overlooked that in order to produce additional revenue it has been necessary for the company to rebuild entirely some portions of the road and make large replacements upon other portions. It has now pending before us an application for bonds to the amount of approximately \$200,000 with which to pay for improvements already made and those yet to be completed. If we were to assume a 5 per cent return upon a capital of \$640,000, and an annual depreciation of practically the same amount, there would be required a net income of approximately \$64,000. To have made this return in the year 1911 would require a total of gross earnings of \$273,000 instead of the actual amount \$228,000, an increase of some \$45,000 assuming that the operating expenses, taxes, and rentals were the same.

It is idle, however, to speculate upon precise figures. If the applicant were to be allowed to issue capital stock to the amount which it desires, namely, substantially \$900,000 and also is allowed to issue bonds to the amount of \$386,000 for improvements, the total capitalization would be \$1,286,000, a 5 per cent return upon which would be \$64,300 annually. Adding to this a depreciation which must be taken care of out of earnings, we reach an amount of required net income which no evidence in the case and no fact known to us justifies us in forecasting. These speculations, of course, are based upon the returns for 1911, which, as above shown, are not correct owing to the franchise restriction hereinbefore discussed. It may be possible for the company to rid itself of that restriction in the future, either by a reversal of the present judgment, or by relief from the legislature, or in some other manner. However, no speculation can be indulged in upon this point.

Summary of considerations as to value:

Referring now to the matters before us, from a consideration of which we must determine the value of this property, we have, first, a reproductive cost less depreciation of \$445,693.98; second, the past earning power of the road a net deficit from its inception to June 30, 1911, leaving wholly out of consideration all fixed charges and returns upon capital invested, coupled with the reasonable prospect that in the immediate future the loss will be changed to profit to some extent; the net income, however, will be diminished to some extent by reason of the franchise restriction; third, the precise amount which the property realized at open competitive sale was \$882,400.78. It must, however, be found from the evidence, that in making this bid the purchaser took into consideration franchise values which we are not permitted to capitalize, and also rated the physical condition of the road much superior to what it was found to be. An evidence of this is that it was found necessary entirely to reconstruct a large portion of the road which it was originally supposed could be put in shape with much less expenditure. After full consideration of all these matters, it is the judgment of the Commission that the value of the road at the time of the purchase did not exceed the sum of \$400,000. There are some matters of expense connected with the acquisition of the property which are properly capitalizable and should be added to this sum. It is unnecessary to detail them at this time.

Dissenting Memorandum.

SAGUE, *Commissioner*:

My understanding of this opinion is that it contemplates making present and prospective earning power a main test of value, and consequently of the capitalization to be authorized by the Commission.

I disagree with the theory as developed in this case, and believe that too much stress is placed upon the element of earning power and too little on the other items which determine value. The main object of supervision of capitalization by the Commission, as I understand it, is to determine a basis for calculating the fairness of rates and the adequacy of service. It is not primarily necessary for the Commission to fix the value of a property to the investor, or to arrive at a conclusion as to what a business man would consider a fair purchase price. The duty of the Commission is to approve of an amount of capital which can be used in making up an honest balance sheet which can be applied later, either by the Commission or the public, as a basis for determining whether a corporation is giving its customers fair treatment.

The most important basis for capitalization would appear to be the money which has been skilfully and economically invested in the property. That this was the view of the Supreme Court in the *Smyth vs. Ames* case, quoted by the Chairman, is indicated by the court's opinion which places '*the original cost of construction*' and '*the amount expended in permanent improvements*' first in the list of elements to be considered as determining the value upon which the reasonableness of rates is to be based.

One of the main elements of earning power must be the rate which a corporation is permitted to charge. Using earning power as a basis for capitalization and later using the capitalization as a basis for fixing rates would involve reasoning in a circle.

In some cases the earning power test might indicate a higher capitalization than the original or reproductive cost would justify, and thus be equivalent to the capitalization of the franchise under which high earnings are obtained. In this case I think the earning power theory is used to reduce the capitalization below a proper amount. Here \$400,000 capital is allowed upon a property for which \$825,000 was paid after a keenly competitive sale, and for which the Commission concedes that the reproductive value less ample depreciation is \$450,000. Clearly the company is entitled to earn a return upon at least \$450,000, and probably upon some additional sum representing the cost of development.

It is impossible to forecast the future earning power of a property with reasonable accuracy. In this case the income after payment of operating expenses increased under the New Haven management from \$14,000 in 1910 to \$41,000 in 1911, nearly three times. With the development of traffic connections, the gross revenue will probably increase rapidly, with a corresponding increase of net earnings. If the present low earning power is used as a basis for reducing capital, it would appear that the corporation might fairly expect permission to increase its capital if a future increase in net earnings appears to justify it. There is, however, no indication in previous decisions of the Commission to show that consent to such increase would be given.

In the Matter of the Application of the THIRD AVENUE RAILWAY COMPANY to acquire and Hold Certain Shares of the Capital Stock of certain Street Railroad Corporations and to Issue, Sell or otherwise Dispose of Its First Refunding Fifty-year Four Per Cent Gold Bonds to Provide Moneys to Pay for Such Shares of Stock and for Certain Bonds.

Case No. 1503.

Issuance of Stock and Bonds—Purposes for Which Securities May Be Issued—Authorization of Sale of Bonds to Provide Funds to Acquire Stock of a Subsidiary Company—Legality of Issue of Stock.—The T. A. Ry. Co. asked permission to issue and sell certain of its bonds to provide funds to acquire certain of the bonds and stocks of subsidiary companies including two hundred shares of the stock of the T. A. R. Co. It appeared that the Commission had authorized the issue of the stock by the T. A. R. Co. upon condition that certain things be done by it, such as amortization of the cost of its franchise during the term thereof, and that the T. A. R. Co. had not yet stated whether it would comply with the Order. HELD,—that in view of the facts stated, there was a question whether the stock had been legally issued and if it were issued except in compliance with the Order of the Commission, the latter could not properly authorize its purchase by the T. A. Ry. Co and permit the use of the funds of the latter corporation for such purpose.

Issuance of Stock and Bonds—Purposes for Which Securities May Be Issued—Authorization of Sale of Bonds to Purchase Securities of Subsidiary Companies—Premature Application.—Upon the hearing of the application of the T. A. Ry. Co. for permission to issue and sell its bonds to purchase stock and bonds of certain of its subsidiary companies, it appeared (1) that the specific purposes for which the money obtained by the issue of the bonds was to be used were not shown; (2) that the amount of bonds to be issued and sold was not given; (3) that it was even the intention of the applicant, as shown by its petition, to finance part of the purchase price of the securities by the issue of promissory notes, payable not more than one year from date, and that no bonds would now be issued for any part of the cost. HELD,—that under such circumstances it was apparent that the application for the approval of a bond issue is premature and that it cannot be acted upon without more specific data.

Transfers of Stock—Purchase of a Controlling Interest in the Stock of a Competing Street Railroad Corporation—Provisions for the Protection of the Interests of Minority Stockholders—Duty of Applicant.—Upon the application of a street railroad corporation for permission to purchase a controlling interest in the stock of another and competing street railroad corporation, the applicant should make provision for the protection of minority stockholders of the corporation whose stock is to be acquired, and the applicant ought to state, before the proceeding before the Commission is closed, just what it is willing to do in this regard, for the attitude of the applicant might largely influence the action of the Commission upon the application.

Transfers of Stock—Purchase of a Controlling Interest in the Stock of a Competing Street Railroad Corporation—Protection of the Interests of Minority Stockholders—Recommendation of the Railroad Securities Commission Approved.—This Commission approves as reasonable the recommendation and rule declared by the Railroad Securities Commission in November, 1911, that any company or group of companies which has purchased a majority of the stock of any existing road may

properly be required to buy the minority stock at the same price as that paid for the majority stock, where the price has been uniform, and that if the price has not been uniform, the purchase should be either at the average price paid for such holdings or at a price to be fixed by appraisal, at the option of the minority stockholders.

Competition between Public Service Corporations—Elimination of Competition Not a Valid Reason for Permitting Acquisition of Control of a Street Railroad Corporation by Its Competitor.—The president of the T. A. Ry. Co. stated that the chief reason why his company desired to acquire control of the N. Y. C. I. Ry. Co. was to prevent the latter from dividing the earnings of the former in the Borough of The Bronx. HELD,—that the elimination of competition between the two carriers is invalid from a public standpoint as a reason for permitting the acquisition of stock control, inasmuch as competition in itself is desirable and beneficial, and it is only when the attendant evils are so objectionable that they outweigh the benefits of competition, that competition should be restricted.

Transfers of Stock—Purchase of Stock Control and Elimination of Competition—Exchange of Transfers and Other Factors Deemed to Warrant Approval of Application.—Upon the application of the T. A. Ry. Co., to purchase a controlling interest in the stock of the N. Y. C. I. Ry. Co., which also operated street surface lines in the Borough of The Bronx, it appeared from the examination of a map showing the lines and franchises of the two companies in the Borough of The Bronx that the companies served the same areas only in part and that in large part the N. Y. C. I. Ry. Co. operated through areas not served by the T. A. Ry. Co. or other companies, and that any resultant elimination of competition would be of a general character only, The T. A. Ry. Co. promised that transfers should be given freely from one line to another if the proposed arrangement were carried out, and it appeared that if this were done the public convenience would be subserved, that the two systems could be operated with greater harmony, that schedules could be arranged to provide better connection in non-rush hours, that the duplication or paralleling of lines could be avoided, and that economies in management and operation would be possible which would result in a much better financial showing than the last five years had revealed. HELD,—that in view of these facts, and particularly the agreed arrangement as to transfers, the application should be approved.

Hearings closed May 29, 1912. Opinion adopted June 28, 1912.

The details of the original application of the Third Avenue Railway Company appear in the Opinion adopted. In so far as the application asked authority to issue and sell or otherwise dispose of bonds of the Third Avenue Railway Company, the application was withdrawn before the close of the hearings. In certain other respects the application was modified before final submission.

The Order entered, on June 28, 1912, in pursuance of the Opinion on that date adopted, provided as follows:

‘Third Avenue Railway Company having made application to the Commission by petition, dated and verified May 8, 1912, pursuant to the provisions of Section 54 of the Public Service Commissions Law, for authorization, among other things, to purchase and acquire six hundred and ninety-three (693) shares of the capital stock of The Dry Dock, East Broadway and Battery Railroad Company, eight thousand and two (8,002) shares of the capital stock of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, six thousand (6,000) shares of the capital stock of The New York, Westchester and Connecticut Traction Company and twenty-eight thousand six hundred and fifty (28,650) shares of the capital stock of the New York City Interborough Railway Company, and a hearing having been had on said application, after due publication of the time, place and purpose thereof, before the Commission on May 25, and May 29, 1912, Mr. Commissioner Maltbie

presiding, Mr. Joseph H. Choate, Jr., and Mr. Herbert J. Bickford appearing as counsel for the petitioner, and said petitioner having withdrawn said application so far as it relates to the issue and sale of its bonds and certain other matters, and due deliberation having been had, it is

‘Ordered, that the purchase and acquisition by the Third Avenue Railway Company of six hundred and ninety-three (693) shares of the capital stock of The Dry Dock, East Broadway and Battery Railroad Company, of eight thousand and two (8,002) shares of the capital stock of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, of six thousand (6,000) shares of the capital stock of The New York, Westchester and Connecticut Traction Company, and of twenty-eight thousand six hundred and fifty (28,650) shares of the capital stock of the New York City Interborough Railway Company, be and the same hereby are authorized.’

· The further facts as to the matter appear in the Opinion adopted.

Henry H. Whitman, for the Commission.

Evarts, Choate & Sherman, by *Joseph H. Choate, Jr.*, and *Herbert J. Bickford*, for the Third Avenue Railway Company.

MALTBIE, Commissioner: In the petition originally filed in this case by the recently reorganized Third Avenue Railway Company, the successor to The Third Avenue Railroad Company, the applicant requested the Commission to permit the company:

1. To acquire and hold 693 shares of stock of The Dry Dock, East Broadway & Battery Railroad Co., having a par value of \$69,300.
2. To acquire and hold such of the remaining 20 shares of the capital stock of same company as the Third Avenue Railway Company may be able to obtain.
3. To acquire and hold 8,002 shares of stock of The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, having a par value of \$800,200.
4. To acquire and hold such of the remaining 287 shares of the capital stock of the same company as the Third Avenue Railway Company may be able to obtain.
5. To acquire and hold 6,000 shares of the capital stock of The New York, Westchester & Connecticut Traction Company, having a par value of \$600,000.
6. To acquire and hold 41,225 shares of the capital stock of the New York City Interborough Railway Company, having a par value of \$4,122,500.
7. To acquire and hold such of the remaining 8,775 shares of the stock of the same company as the Third Avenue Railway Company may be able to obtain.
8. To acquire and hold 200 shares of the capital stock of the Third Avenue Bridge Company, having a par value of \$20,000.
9. To issue and sell at not less than 80 per cent of their par value first refunding 50-year four per cent gold bonds of the Third Avenue Railway Company to provide funds to acquire.

(a) 1,413 first mortgage bonds of the New York City Interborough Railway Company, having a face value of \$1,413,000.

(b) Such additional shares of the capital stock of the same company as the Third Avenue Railway Company may be able to purchase.

(c) Two hundred shares of stock of the Third Avenue Bridge Company for \$20,000.

(d) Such of the remaining twenty shares of the capital stock of The Dry Dock, East Broadway & Battery Railroad Company as the Third Avenue Company may be able to purchase.

(e) Such of the remaining 287 shares of the capital stock of the Forty-second Street Company as the Third Avenue Company may be able to acquire.

COST OF SECURITIES.

According to the petition, the Bondholders' Committee of The Third Avenue Railroad Company and Mr. Whitridge, formerly receiver of that company and now President of the reorganized corporation, purchased certain securities which they purpose to turn over to the Third Avenue Railway Company upon payment of certain amounts. The original cost of these securities to the Committee and to Mr. Whitridge was as shown in the Table of Purchase Price of Securities (Table I), on page 332, *post*.

The petition stated that the Bondholders' Committee and Mr. Whitridge would turn these securities over to the Third Avenue Railway Company at a cost as given above plus expenses connected with their acquisition. The stock of the Third Avenue Bridge Company was to be purchased of the present holders at par—\$20,000.

MODIFICATIONS URGED.

At the hearings held by order of the Commission, certain important matters were called to the attention of counsel for the applicant. It was pointed out that the Commission had authorized an issue of stock by the Third Avenue Bridge Company upon condition that certain things be done, such as the amortization of the cost of the franchise during its life, and that the company had not yet stated whether it would comply with the Order. Consequently, there was question whether the stock had been legally issued, and if issued whether the order of the Commission would be obeyed. Obviously, if the stock were illegally issued, it would be improper to authorize its purchase by another corporation and to permit the use of funds of a corporation for such a purpose. Further, reference was made in the evidence to a large unfunded debt not appearing in the balance sheet of the company.

Attention was also called to the fact that the specific purposes were not shown for which the money obtained by the issue of bonds was to be used, and that the amount of bonds to be issued was not given. Indeed, the petition states that it is the intention of the applicant to finance part of the purchase price of these securities by the issue of promissory notes payable not more than one year from date, and that no bonds will now be issued for any part of the cost. Under such circumstances, it is apparent that the application for the approval of a bond issue is premature and cannot be acted upon without more specific data.

PROTECTION OF MINORITY STOCKHOLDERS.

The petition covers the acquisition of stocks in four different companies. In two (the Dry Dock and Forty-Second Street companies), the Third Avenue Company already owns a majority of the stock, and counsel stated that the company would willingly purchase at a fair price the few remaining shares if they could be found. In a third (The New York, Westchester & Connecticut Co.) the applicant purposes to acquire every share. In the case of the New York City Interborough Company, the Third Avenue Company does not now own a single share of its stock. A controlling interest—27,500 shares out of 50,000—is offered with 1,413 bonds of the same company. The petition states that the company may also acquire 1,150 shares for \$8,650 or about \$7.50 per \$100 share, and 12,575 shares for an aggregate cost of \$227,609.37—an average price of \$18.10 per share

TABLE I.—PURCHASE PRICE OF SECURITIES.

	Par Value.	Cost.	Average Price.
—	\$	\$	
Stocks—			
1 Dry Dock, East Broadway and Battery R. R. Co.....	69,300	50 00	7 2 cents per share
2 Forty-second Street, Manhattanville and St. Nicholas Ave. Ry. Co.	800,200	375 00	4 7 "
3 New York City Interborough Ry. Co.....	115,000	8,650 00	\$7.52 "
4 " " "	1,257,500	227,609 37	\$18.10 "
5 New York, Westchester and Connecticut Traction Co.....	600,000	175 00	3 cents "
Bonds—			
6 Forty-second Street, Manhattanville and St. Nicholas Ave. Ry. Co.....	22,000	9,900 00	\$450.00 per bond.
7 New York, Westchester and Connecticut Traction Co.....	2,500,000	200 00	8 cents per bond.
Stocks and bonds—			
8 New York City Interborough Ry. Co— Bonds	1,413,000 }	1,267,500	
Stocks	2,750,000 }		

In this connection three points were raised:

(1) What is the justification for a payment of \$13.10 per share for one block and \$7.50 per share for another, when the company would have a controlling interest without either?

(2) Would the company be willing to pay the holders of the remaining 8,775 shares of stock the average price paid for the last large block (\$18.10 per share)?

(3) If not, what would the company propose for the protection of the minority interest?

Regarding the first, the evidence shows that the higher price was to be a reward for the assistance the holders rendered 'in conducting the negotiations and putting the thing through.' Before the close of the hearings, the applicant withdrew this part of the petition and announced that the options had been allowed to lapse.

In reply to the other questions, the company stated it would not be willing to pay \$18 per share for the minority holdings. I then stated at the hearing that in my opinion some provision should be made for the protection of the minority stockholders and that the company ought to state before the proceeding is closed what it is willing to do, for its attitude might largely influence the action of the Commission upon this phase of the pending application. In the Report of the Railroad Securities Commission to President Taft, in November, 1911, the dangers of intercorporate holdings are pointed out in the following terms:

'Any artificial stimulus to these intercorporate holdings is a public evil. Where a railroad controls the operations of another railroad by owning a majority of its stock, or where a holding company controls the operations of several roads in the same manner, we have all the disadvantages of consolidation, without getting all of its advantages. We get the centralization of financial power; we do not get all the economy of operation which should go with it.

'Apart from this general danger, we open the way to several specific evils.

Where a railroad controls the operations of another road by the ownership of a majority of its stock, there is constant danger that the minority holders will not be fairly treated. The road thus purchased has become part of a large system, and is operated by the representatives of the whole system. It is almost

certain that the advantage of the whole will be preferred to the separate interests of the part in matters of operation, traffic and finance.

'Again, the existence of two or more companies under the same management, having separate organizations but united control, invites the concealment of financial transactions by the shifting of charges from one company to another. We have already shown how this may happen in the construction of a new road. It is equally possible in the operation of an old one.'

The Commission makes the following reasonable recommendation where such intercorporate holdings already exist:

'Any company, or group of companies, which has purchased a majority of the stock of any existing road may properly be required to buy the minority stock at the same price as that paid for the majority stock where the price has been uniform. If the price has not been uniform, the purchase should be either at the average price paid for such holdings or at a price to be fixed by appraisal, at the option of the minority stockholders.'

At the final hearing the company stated that it would be willing to pay not to exceed \$7 per share for all or any of the 21,350 shares outstanding, this being about the average price for the shares obtained in the open market and about the price paid at the last sale. No proposition for the purchase of these shares has been submitted for approval by the Commission, and we do not find that the Third Avenue Company should pay \$7 for each of the remaining shares, but the statement of the company is considered sufficient, under the circumstances of the case, to remove any objection to the proposed purchase of stock upon this point.

REVISED APPLICATION.

The modified application as it stood at the close of the hearings asked merely for authority—

1. To acquire and hold 693 shares of stock of The Dry Dock, East Broadway & Battery Railroad Co., having a par value of \$69,300.
2. To acquire and hold such of the remaining 20 shares of the capital stock of the same company as the Third Avenue Railway Company may be able to obtain.
3. To acquire and hold 8,002 shares of stock of The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, having a par value of \$800,200.
4. To acquire and hold such of the remaining 287 shares of the capital stock of the same company as the Third Avenue Railway Company may be able to obtain.
5. To acquire and hold 6,000 shares of the capital stock of The New York, Westchester & Connecticut Traction Company, having a par value of \$600,000.
6. To acquire and holds 28,650 shares of the capital stock of the New York City Interborough Railway Company, having a par value of \$2,865,000.
7. To acquire and hold such of the remaining 21,350 shares of the stock of the same company as the Third Avenue Railway Company may be able to obtain.

The request for authority to issue bonds was completely withdrawn; likewise the purchase of 12,575 shares of stock of the New York City Interborough Company, at a cost of \$227,609.37. The Commission was asked to suspend action on the purchase of the capital stock of the Third Avenue Bridge Company without prejudice to the submission of a new application relative to this matter.

Consent to purchase bonds of The Forty-second Street, the New York City Interborough and The New York, Westchester and Connecticut companies is not requested. As these purchases are not to be financed by the issuance of securities, they do not now come before the Commission even indirectly. The cost of the bonds of The

Forty-second Street and the New York, Westchester and Connecticut companies is to be paid out of funds already in hand, and no request is to be made for its capitalization. The stocks of The Dry Dock, The Forty-second Street and The New York, Westchester and Connecticut companies are to be purchased at nominal sums, paid for out of funds in hand and not capitalized. Hence, the Commission expresses no opinion as to the reasonableness of the prices paid, but in the two cases where the Third Avenue Railway Company already owns a controlling stock interest, it may be of interest to compare the present rates with the average prices paid by the old Third Avenue Railroad Company, according to the evidence introduced in Case No. 1181 and summarized in the Opinion of the Commission adopted July 29, 1910:—

	Average cost per \$100 share.	
	Past.	Present.
Stock of The Dry Dock E. B. & B. R. R. Co. . .	\$226 85	7.2 cents
Stock of the 42d St., Man. & St. Nic. Av. Ry. Co.	117 67	4.7 “

The old Third Avenue Railroad Company also purchased 357 bonds of The Forty-second Street company for which it paid upon an average \$857.56. The twenty-two bonds recently purchased by the Bondholders' Committee cost \$450 per bond, or practically one-half the amount originally paid per bond.

FINDINGS OF COMMISSION.

Items 2, 4 and 7 of the amended application relate to future purchases of stock. As there are no specific proposals now pending, the Commission withholds consent; a new application may be made when there is a definite proposition to be approved.

Items 1 and 3 relate to minority interests in companies in which the Third Avenue Company already owns a majority of the stock. In the case of The Forty-second Street company, the applicant already owns two-thirds of the stock; and in The Dry Dock Company over 94 per cent. The Commission approves the proposed purchases.

The acquisition of the stock of the New York, Westchester & Connecticut Traction Company—item 5—seems open to no objection. The applicant will own the entire issue and the stock and bonds will cost only \$375. The company has little or no physical property and its balance sheet which shows ‘fixed capital—\$3,144,977.33’ is very misleading. It is apparently only a balancing entry. This company was organized and the securities issued prior to the creation of the Public Service Commission. The balance sheet ought to be rewritten to represent the facts.

If the New York, Westchester & Connecticut Company were to be merged or consolidated with the Third Avenue Company, certain questions would arise; but, as such merger or consolidation may not take place without the approval of the Commission, and as action in this proceeding in no way commits the Commission to approval of merger or consolidation if either is ever proposed, it is unnecessary to discuss these questions now.

NEW YORK CITY INTERBOROUGH COMPANY.

The only item remaining to be considered relates to the New York City Interborough Company. This Company has been a competitor of the Union Railway Company, all of whose stock is owned by the Third Avenue Company. The New York City Interborough Company was incorporated March 24, 1902, being formed according to the evidence of one witness in this proceeding ‘at the time the so-called traction war was going on by one of the great interests for the purpose of destroying the Union Railway.’ By June 30, 1905, the company had issued a first mortgage to secure \$5,000,000 face value of first mortgage four per cent gold bonds, due May 1, 1928. According to the annual report of the company to the Board of Railroad Com-

missioners for the year ending upon that date, capital stock having a par value of \$5,000,000 had been issued, \$400,000 for cash and \$4,600,000 for construction, etc.

Through the instrumentality of various contracts, a majority of the stock and \$1,500,000 in bonds came under the control of the Interborough Rapid Transit Company—the operator of the present subway system. It is part of these bonds and stocks that the Third Avenue Company desires to acquire—\$1,413,000 face value of bonds and 27,500 shares of stock, for \$1,350,000. As the money to be paid for these securities is to be raised by the issuance of notes running for less than one year, which need not be approved by the Commission, the acquisition of the bonds is not now before the Commission, and the action taken upon the pending application in no way commits the Commission to the approval of an issue of bonds to retire the notes when due. The question may never arise, for the notes may be paid out of income, but this statement is made that there may be no misunderstanding, and that it may be realized that the propriety of the acquisition of the bonds and the capitalization of their cost will be considered when it arises *e. g.*, when approval is asked for the issuance of securities to defray that cost. The financial condition of the New York City Interborough Company and the results of operation up to date are important in this connection.

Passing to the specific matter now pending—the acquisition of the stock—it is to be noted that the purchase price is practically *nil* according to the record. A lump sum is to be paid for both stock and bonds. I attempted to ascertain at the hearings what part of this \$1,350,000 was considered to represent the stock. The record reads as follows:

‘By Mr. Choate:

Q. Isn't it a fact that you made your offer for the bonds and then got the bonds and the stock for the price you had offered for the bonds alone?

‘A. Yes.’

In view of this statement, which indicates that the stock cost practically nothing, and as no amount is to be capitalized, this phase of the subject raises no insuperable objections.

It has been suggested that the rate of eight cents for through transportation over the lines of the Interborough and the New York City Interborough companies may be abolished if the application is approved. It may be abolished if the application is not approved, for the Interborough Company can make and unmake the contract at will. The powers of the Commission are the same whether the stock of the New York City Interborough Company is owned by the Interborough Company or by the Third Avenue Company. However, Mr. Whitridge expressed an intention to eliminate the through rate and to extend the transfer privilege between the New York City Interborough lines and the other Bronx lines. No one appeared in opposition.

When asked to state the reasons why the Third Avenue Company desired to acquire the control of the New York City Interborough Company, Mr. Whitridge testified as follows:

‘By Mr. Choate:

‘Q. Then, I take it that the reason the petitioner, the Third Avenue Railway Company, wishes to purchase this stock is because it will benefit the Union Railway Company, a large part of the stock of which is owned by the petitioner?—A. We do.

‘Q. That is the fact?—A. Yes.

‘By Commissioner Maltbie:

‘Q. In what way would it benefit the Union?—A. Why, it has prevented a rival from being developed. It would have been possible, in my judgment, if the New York City Interborough had been vigorously managed and built, to pretty nearly divide the earnings in The Bronx. I don't know that it would at once, but ultimately; and also it is going to be a profitable investment.

'By Mr. Choate:

'Q. Will the purchase be a benefit to the public served by the two railroads?—A. I think that the purchase is a benefit to the public served.

'Q. In what respect?—A. Well, in the first place, they have three or four lines built that the other people were talking about for a great many years. They are actually built now, and there are more streets operated on and more people accommodated in different directions.'

The chief reason mentioned—the elimination of competition between the Union and the New York City Interborough companies—is invalid from the public standpoint. Competition in itself is desirable and beneficial. It is only when the attendant evils are so objectionable that they outweigh the benefits of competition that competition should be restricted. Consequently, if the only result of the acquisition of the stock of the New York City Interborough Company by the Third Avenue Company were the elimination of competition between the former company and the Union Company, such acquisition should not be approved. And so far as the record in the case goes, no adequate basis has been laid for approval by the Commission. However, there are other considerations of which the Commission will take cognizance although not mentioned in the record.

An examination of a map showing the lines and franchises of the various companies in the Borough of The Bronx indicates that the New York City Interborough Company taps only in part the same areas supplied by other companies. In many instances, it operates through areas not served by other companies, and the unification of the two systems would in those areas eliminate competition of a general character only. An examination of the map and of the currents of travel also shows that the public would be inconvenienced by such unification, assuming that transfers would be given freely from one line to another as promised by Mr. Whitridge and as is now being done. The system could be operated with greater harmony. Schedules could be arranged to provide better connections at non-rush hours. The duplication or paralleling of lines could be avoided. Economies in management and operation are possible which should result in a much better financial showing than the last five years have revealed.

In view of these facts, and particularly the arrangement as to transfers, the acquisition of 28,650 shares of stock of the New York City Interborough Company is approved.

In the Matter of Application of NEW YORK RAILWAYS COMPANY for authority to issue \$2,600,000 of bonds under its First Real Estate and Refunding Mortgage, dated January 1, 1912, for new cars and car-barn reconstruction.

Case No. 1560.

Issuance of Stocks and Bonds—Purposes—Issue of Bonds for New Cars and Car-Barn Reconstruction—Extent of Capitalization Permissible—Capitalization of Replacements Improper and Illegal—P. S. C. L., § 55.—The applicant, a street railroad corporation, asked for the authorization of an issue of four (4) per cent bonds under its first real estate and refunding mortgage sufficient to net \$1,600,000, of which \$1,050,000 was to be applied to the acquisition of 175 new stepless cars at approximately \$6,000 each, and \$550,000 to the reconstruction of its Fifty-fourth street car barn. It appeared that the new cars were to take the place of an equal number of old cars to be retired from service and that the reconstruction of the car barn might be necessitated by a contemplated sale and discontinuance of the use of another car barn, and that no part of the proposed expenditures would be taken from earnings. HELD, that

under P.S.C.L., § 55, the Commission has no legal power to authorize the issue of bonds for replacements or maintainance of service, that bonds will not be authorized for the cost of cars or car-barn reconstruction to the extent that such cost covered replacements, and that bonds will be authorized only to provide for the difference between the cost of the old cars and the cost of the new cars.

Issuance of Stock and Bonds—Issuance of Bonds Violating Terms of Mortgage.—The mortgage under which the applicant proposed to issue bonds, as well as another mortgage covering its property, required the applicant to keep its street railroad adequately equipped with rolling stock and to replace the rolling stock with other rolling stock of at least equal value and capacity, and to set apart for such purpose so much of the earnings as might be required for maintenance and replacement. HELD, that to the extent that the new cars replaced the capacity of the old ones, the issuance of bonds for that purpose would violate the mortgage.

Issuance of Stock and Bonds—Purposes—Capitalization of Replacements—Capitalization of Difference between Capitalized Value of Old Property and Cost of New Property.—As the Commission had previously found that the capitalization of the applicant largely exceeded the fair value of its recently acquired property, and that in justifying such capitalization the cars to be replaced had been rated by applicant at a much higher value than was now attributed to them. HELD, that it would be proper to capitalize the difference between the cost of the new cars and the capitalized value of the old cars only if the latter had been capitalized at not exceeding their true value at the time of acquisition.

Issuance of Stock and Bonds—Purposes—Capitalization of Replacements—Capitalization of Service Value.—The capitalization of the replacement of old but serviceable cars by new cars, upon the basis of improvement in service which will be effected by the new cars, will not be authorized, as replacement and maintenance expenditures are operating charges, and the capitalization of operating charges must stop because such a method of financing would be equally applicable to all replacement and maintenance charges, is without a corresponding increase in property, and has in the past been ruinous to public service corporations and detrimental to the public interests.

Issuance of Stocks and Bonds—Purposes—Capitalization of Replacements as an expedient to Avoid Interruption of Interest on Income Bonds.—The capitalization of replacements, because the applicant has no funds from which to pay therefor, and because the payment of interest on income bonds would be prevented if the replacements were charged against earnings, will not be authorized, as capital must be kept intact out of earnings, provision must be made for depreciation and replacement, and interest on income bonds cannot be legally paid until provision has been made for replacements; and this holding is emphasized in view of the fact that the capitalization of the applicant largely exceeded the fair value of its recently acquired property, and the proposed capitalization exceeded the fair value of the property, and that the estimated earnings were not sufficient to pay all operating and fixed charges and five (5) per cent interest on the income bonds, and of the fact that the applicant has declared as earned and payable—or the first six months a partial interest on the income bonds.

Depreciation—Provision for Depreciation Required by the Commission and Allowed by the Courts.—This Commission has taken the position from the beginning that capital must be kept intact out of earnings, and that provision must be made for depreciation and the ultimate replacement of all wasting assets; and the courts have repeatedly allowed a deduction from earnings therefor, and have held that a sinking fund for renewals and replacements should be set aside from earnings.

Depreciation—Provision for Replacements Prior to Payment of Interest on Income Bonds.—Interest on income bonds cannot legally be paid until provision has been made for replacements.

Issuance of Stock and Bonds—Standards of Capitalization of Additions and Improvements—"Relative Cost" Standard Adopted.—Upon an application for the issuance of bonds, there are three standards by which the amount which should be capitalized upon replacing cars with improved cars may be determined: (1) Estimated cost-to-reproduce-new of the old cars as compared with the new; (2) relative capacity, and (3) relative cost. The first is the most uncertain and unsatisfactory; the second is the more scientific and less uncertain in its effects; and the third is the correct one to apply when the accounts have been correctly kept, when they show the actual original cost of the displaced units, and when the replacements are different in type and capacity. After an examination of the accounts of the applicant which were not, however, sufficiently complete, and an estimation of the original cost of the cars, the third standard was applied in this case.

Accounts and Funds—Uniform System of Accounts Required to be Followed upon Acquisition of Larger and more Expensive cars to Displace Old Ones.—Upon the authorization of an issue of bonds the proceeds of which were to be applied to new cars to displace old cars in service, the applicant should follow the provisions of the uniform system of accounts prescribed by the Commission for street and electric railways, in regard to replacements, withdrawals or retirements, betterments, amortization and depreciation.

Accounts and Funds—Applicability of Depreciation Reserve to Replacements.—It was suggested that, as the applicant has, or shortly would have, more accrued amortization of capital than is necessary to pay for the cost of replacing cars, the fund might be utilized by the applicant to cover the replacement cost of the new cars.

Issuance of Stocks and Bonds—Authorization of Issuance of Bonds—Restriction as to Use of Proceeds.—As the cost of the new cars, on account of which the issuance of bonds was authorized, is not definitely known, the practice prescribed by the Commission in other cases of authorizing the withdrawal of the proceeds from the sale of bonds from time to time as the expenditures were submitted and approved, will be followed.

Cars of Street Railroad Corporations—Fenders and Wheelguards—Approval of the Issue of Bonds for Acquiring New Cars—Provision as to Safety Appliances.—The approval of the issue of bonds on account of the acquisition of new cars to displace cars in service, the plans for which new cars do not show in detail the provision for fenders or wheelguards, does not carry with it permission to operate the new cars without such safety devices as required by the Commission's previous order.

Issuance of Stock and Bonds—Replacement and Improvement of Car Barn—Same Principles: Applied as to Replacement and Improvement of Cars.—The principles laid down as governing the part of the application relating to the issuance of bonds for new cars will be applied to the part of the application relating to the issuance of bonds for car-barn reconstruction, and the capitalization of the portion of the expenditure representing replacements will not be authorized; nor will the capitalization be authorized of so much of the cost of reconstructing the car barn which covers an addition to the car barn to replace another car barn about to be sold.

Issuance of Stocks and Bonds—Temporary Financing of Improvements or Additions in Anticipation of the Issue of Capitalization.—For the brief period between the time when the cost of car-barn reconstruction would become payable and the time when the applicant may consummate the sale of another car barn which necessitated such reconstruction and the proceeds of which could be applied to the payment of such cost, applicant can finance the cost of the replacement either from

income or by short-time loans; and, if the sale be not consummated and the funds therefor be not available, the principles applied to the capitalization of car additions will be applied to the car-barn reconstruction.

Hearings closed September 27, 1912. Opinion adopted November 1, 1912.

The New York Railways Company made application to the Commission for the authorization of an issue of \$2,600,000 of four (4) per cent bonds under its first real estate and refunding mortgage, dated January 1, 1912, in addition to \$16,299,167.66 of bonds theretofore issued under the mortgage. The proceeds of the bonds were to be applied to the cost of new stepless cars and of the reconstruction of a car barn at 54th street and Ninth avenue, in the Borough of Manhattan. During the hearings, the company modified the application so as to ask for authority to issue bonds in an amount sufficient to provide \$1,600,000 for cars and car-barn reconstruction.

On January 24, 1912, the Commission adopted an order authorizing, in conformity with the decision of the Court of Appeals in *People ex rel. Third Avenue Railway Company et al. vs. Public Service Commission for the First District* (203 N. Y. 299), the issuance by the New York Railways of \$16,768,100 four (4) per cent refunding bonds, \$31,933,400 five (5) per cent adjustment non-cumulative income bonds, and \$17,500,000 stock, and on February 27, 1912, adopted an Order giving consent to the execution and delivery by the New York Railways Company of two corporate mortgages—a first real-estate and refunding mortgage, dated January 1, 1912, not limited in amount, bearing interest from January 1, 1912 at (4) per cent per annum, and an adjustment mortgage dated January 1, 1912, to secure an issue of \$33,000,000 bonds, bearing interest at (5) per cent per annum, non-cumulative, provided the company shall have earned five (5) per cent per annum.

The Order adopted by the Commission on January 24, 1912, authorizing the issuance of the securities by the New York Railways Company, and the Opinion of the Commission as to the mortgages and reserve accounts of the New York Railways Company, will be found in *Re Metropolitan Street Railway Company Reorganization*, at pages 113, *et seq.*, of this volume.

The decision of the Court of Appeals in the Third Avenue case will be found at pages 22-29 of this volume.

The Order entered on November 1, 1912, in pursuance of the Opinion, provided, in full, as follows:

‘Section 1—Application having been made to the Public Service Commission for the First District by the New York Railways Company under provisions of the Public Service Commissions Law for the consent of the Commission to the issuance by said company of bonds to the amount of two million six hundred thousand dollars (\$2,600,000), face value, said bonds to be payable on the first day of January, 1942, and to bear interest at four (4) per cent per annum, payable semi-annually and secured by a mortgage upon all the property of the company, known as its Thirty-Year First Real Estate and Refunding Mortgage, dated January 1, 1912, made to the Guaranty Trust Company of New York as Trustee, and a hearing having been duly held upon said application before the Commission, Honourable Milo R. Maltbie, Commissioner, presiding; and it being now the opinion of the Commission:

‘(1) That the money to be procured by the issue of said bonds of the said New York Railways Company to the amount of six hundred and forty thousand dollars (\$640,000) face value, payable at a period of more than twelve months after the date thereof, is necessary to and reasonably required by said company for the acquisition of property, and particularly for the purpose which is hereinafter stated in this order; and

‘(2) That, except as to the following specified amount of said bonds authorized to be issued hereunder to procure money for the purposes following, to wit:

‘\$140,800 or so much thereof as may be necessary to pay expenses of sale and make up discount.

said purpose is not in whole or in part reasonably chargeable to operating expenses or to income;

'Section 2. It is Ordered, that the Public Service Commission for the First District does hereby authorize the issue by the said New York Railways Company of six hundred and forty thousand dollars (\$640,000) face value of principal of bonds of said company, maturing the first day of January, 1942, redeemable on and after January 1, 1916, at one hundred and five (105) per cent of the par or face value thereof besides accrued interest and to bear interest at four (4) per cent per annum, payable semi-annually under and in pursuance of the terms of the mortgage heretofore and on the first day of January, 1912, made and executed by the said New York Railways Company to the Guaranty Trust Company of New York as Trustee.

'Section 3. It is Ordered, that the said issue of bonds is authorized upon the conditions following and not otherwise, to wit:

'*First.* That the said New York Railways Company shall sell the said bonds hereby authorized so as to net the said company not less than seventy-eight (78) per cent of the par value of the principal thereof, besides interest accrued thereon, and that the proceeds thereof shall be applied only to the following purposes, that is to say:

- '(1) For acquisition of property described as follows:
New stepless cars for use on its lines of railroad... ..\$499,200
- '(2) For expenses of sale of bonds hereby authorized and to make up the discount or deficiency, if any, in the amount realized from the sale to net not less than seventy-eight (78) per cent of par of the bonds sold for the purposes specified in subdivision one (1) hereof and to be applied *pro rata* for the purposes therein stated, not exceeding the sum of... .. 140,800

Total... ..\$640,000

'*Second.* That in order to provide for the amortization of the said one hundred and forty thousand eight hundred dollars (\$140,800), of bonds issued for expenses and discount, the said New York Railways Company shall establish and maintain a cumulative sinking fund, and that for said purpose said company shall pay in cash into said fund out of income on the 31st day of December, 1913, and on the 31st day of December in each and every year thereafter until the 31st day of December, 1941, or until said fund with accumulations shall have aggregated one hundred and forty thousand eight hundred dollars (\$140,800), an amount of money which shall not be less than two thousand seven hundred dollars (\$2,700) plus four per centum upon all prior payments into said fund. Said company shall use the cash in said sinking fund for the acquisition, at the authorized price of issue, of first mortgage refunding bonds issued by said company directly to said fund. If there shall be cash in said sinking fund not either used or required for the purchase of bonds, as hereinbefore provided, said company shall use such money for the acquisition of property for capital or investment purposes so long as the annual payments to said fund shall not exceed the sum of \$10,000. At such time as the annual payments to said fund amount to \$10,000 or more, and there is cash in said fund not either used or required for the purchase of bonds as hereinbefore provided, said company shall cause an advertisement to be

inserted in at least two newspapers of general circulation published in the Borough of Manhattan, City of New York, once in each week for four successive weeks, that the company on the next interest date will purchase for the sinking fund to the extent of the cash in its hands, first mortgage refunding bonds of said company then outstanding, at the lowest price for which the same shall be offered, not exceeding one hundred and five per centum (105%) of the par value thereof, plus accrued interest. Upon said date said company shall apply the cash in sinking fund then in its hands to the purchase of such bonds of said company with unmatured coupons attached tendered to it as aforesaid, at not exceeding one hundred and five per centum (105%) of the face value thereof, plus accrued interest, giving preference in said purchases to the bonds which shall be offered at the lowest price; and in case bonds shall be offered by two or more holders at the same price, to an amount in the aggregate exceeding the cash in sinking fund applicable thereto, then giving preference to such bonds in the order of the date of the reception by said company of the offer to sell the same. Any cash remaining in the sinking fund after application as hereinbefore provided shall be deposited in bank in a separate fund. All bonds acquired for the sinking fund shall be stamped as irrevocably belonging to the sinking fund and shall not again be issued, and all coupons upon said bonds shall be cancelled.

'Third. The said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the bonds hereby authorized to be issued and on or before the tenth day of each month the company shall make verified reports to the Commission stating the sale or sales of said bonds during the previous month, the terms and conditions of sale, the moneys realized therefrom, and the use and application of such moneys; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

'Fourth. That the total amount to be expended by said company from the proceeds of the aforementioned bonds hereby authorized for the purpose specified in subdivision (1) of paragraph *First* of Section 3 of this order (other than the receipts on account of accrued interest) for or on account of each car specified in said subdivision, shall not exceed the difference between the sum of three thousand two hundred dollars (\$3,200) and the entire cost of such car complete and ready for operation.

'Fifth. That none of the proceeds of the aforementioned bonds hereby authorized for the purpose specified in subdivision (1) of paragraph *First* of Section 3 of this order, other than the receipts on account of accrued interest, shall be expended by the said company for the purpose specified therein until a properly itemized bill for each proposed expenditure shall have been submitted to the Commission by the company with the certificate of one of its officers that such expenditure represents a real increase in its fixed capital as defined in the accounting rules of the Commission and not a replacement of any part of such fixed capital or a substitution for wasted capital or other loss properly chargeable to income, and until such bill shall have been approved by the Commission.

'Sixth. That the authority hereby given to issue such bonds shall apply only to bonds issued by the said company on or before the thirtieth day of June, 1913.

'Section 4. It is Ordered, that this order take effect on the first day of November, 1912, and except as provided in the *Sixth* paragraph of Section 3 limiting the duration of the authority to issue such bonds herein granted, continue in force until otherwise ordered by the Commission, and that within

ten days after service upon it of a copy of this order said company notify the Commission whether the terms of this order are accepted and will be obeyed.

The further facts in this proceeding are set out in the Opinion adopted.

Harry M. Chamberlain, for the Commission.

Richard R. Rogers and *William M. Coleman*, for the New York Railways Company.

MALTBIE, Commissioner: The applicant in this case is the New York Railways Company, a street service railroad corporation, incorporated in December, 1911, for the purpose of acquiring the franchises and property of the Metropolitan Street Railway Company sold under foreclosure (see *Metropolitan Street Railway Company Reorganization*, 3 P. S. C. R., 1st Dist. N. Y., 113-204.) The company has issued two mortgages:—

(1) A first real-estate and refunding mortgage to the Guaranty Trust Company of New York as trustee, dated January 1, 1912, to secure an issue of bonds of the company, such bonds to be dated as of January 1, 1912, to be payable on January 1, 1942, and to bear interest from January 1, 1912, at 4 per cent per annum, payable semi-annually;

(2) An adjustment mortgage to the Farmers Loan and Trust Company as trustee, dated January 1, 1912, to secure an issue of \$33,000,000, face value of bonds of the company, such bonds to be dated as of January 1, 1912, to be payable on January 1, 1942, and to bear interest at the rate of 5 per cent per annum, non-cumulative, provided the company shall have earned 5 per cent per annum.

NATURE OF APPLICATION.

Under the first mortgage, bonds had been issued upon August 14, 1912, to the amount of \$16,299,167.66, and the company now requests the permission and approval of the Commission to a further issue of bonds under that mortgage. In the original application, the company fixed the amount to be issued at \$2,600,000 for the following purposes:—

1. 320 new stepless cars.	\$1,600,000
2. Additions to car barn at 54th Street and 9th Ave	550,000

Total cash requirements. \$2,150,000

If the bonds were issued at 80 per cent of their par value, the total amount needed in order to provide the necessary funds would be approximately \$2,700,000 in bonds.

During the progress of the hearings the petition was considerably modified, and as it now stands the company asks for permission and authority to issue first mortgage bonds in an amount sufficient to provide funds for the following purposes:—

1. The acquisition of 175 cars at approximately \$6,000 per car	\$1,050,000
2. The reconstruction of the 54th St. car barn.	550,000

Total cash requirements. \$1,600,000

The amount of bonds to be issued to provide these funds would obviously depend upon the amount at which they could be marketed but in any event it would be less than the amount called for in the original application, as the bonds would yield between 75 and 80.

REPLACEMENTS TO BE CAPITALIZED.

The company does not intend to add 175 new cars to its present equipment, but for each new car purchased an old car is to be retired from service, so that when all of the new cars have been placed in service, the total number of cars in use will be the same as at present. When pressed for justification of this proposal, the representatives of the company stated that they should be permitted to capitalize at least the difference between the *cost* of the new cars and the *present value* of the old. According to the manager of the company, the old cars are worth from \$250 to \$1,000 per car, depending largely upon whether a street railway company can be found which could utilize them. Upon the basis of an average value of 600 per car the company would capitalize \$5,400 for each new car purchased, and no part of the cost would be taken directly or indirectly from earnings. *The cost of replacements would thus be defrayed by new capital issues.*

ATTEMPTED JUSTIFICATION OF PROPOSAL.

1. The company attempted to justify this extraordinary proposition in this way. It was said that the New York Railways Company had recently acquired the system, that it had purchased the property at its present value and that the capitalization of the company represented only its present value and not its original cost. Hence, it was argued, it would be proper to credit capital account with the present value of the property displaced (\$250 to \$1,000 per car) and to charge capital account with the entire cost of the new property (\$6,000 per car).

This argument is ingenious and would be important if true. As a matter of fact, the Commission found in a previous case (*Metropolitan Street Railway Company Reorganization*, 3 P. S. C. R., 1st Dist. N. Y., 113, 181), that the capitalization of the New York Railways Company exceeded the fair value of the property by at least \$16,500,000.

Furthermore, the evidence submitted by the Bondholders' Committee in that case as to the value of the property and upon which the Bondholders' Committee justified the capitalization of the new company, rated the cars which are now to be removed from service at a value of over \$3,700 per car. The expert witness who presented this estimate claimed that value was equivalent to cost to reproduce new, but he was not the expert who testified in the present proceeding that the present value of the cars is from \$250 to \$1,000, the purpose of the two cases is entirely different. The Transportation Engineer of the Commission testified in the Reorganization case that in his opinion the value of the cars at that time was about \$822 per car.

If the reorganization of the Metropolitan system had been carried through upon the basis of the appraisal of the expert for the Commission, and if these cars had been capitalized at \$800 per car, the applicants might now claim consistently that the company should be allowed to capitalize the difference between the *cost* of the new car and the *capitalized value* of the old car. The net addition to capital account would be \$5,200 per car, and so far as these cars are concerned, the capital of the company would be represented by physical property to the extent of the capitalization.

It was suggested that if the company wished to take advantage of this theory, it should have revised the entries upon its ledgers. According to the balance sheet for June 30, 1912, the company has one entry to represent practically all of its property. This item, amounting to \$74,384,737.10, is a balancing item entered upon the books in order that assets may equal liabilities. If the company is to continue the practice which it wishes to have the Commission approve in this instance, viz., the capitalization of replacement at the difference between the value of the old and the cost of the new, it should distribute this item of over \$74,000,000 and enter the various classes of property which it owns at their value. It can not well refuse to

do so and ask the Commission to believe that its property is capitalized at its 'present' value. If it attempts to disintegrate that large item, it is likely to encounter new difficulties and probably will have a large unassigned balance which it will be obliged to enter in the account, 'Other Intangible Street Railway Capital,' as representing 'franchises,' 'good will,' 'going concern,' or other intangibles. As a matter of fact, however, the company does not carry the cars in question upon its books at any specific amount; they are lost in the balancing entry of over \$74,000,000.

2. It has been suggested, also, that the old cars are not worn out and are still capable of much service; that the company would not be justified in retiring them at present except on the ground that new cars will enable it to improve the quality of service rendered to the travelling public; that such improvement in service should be paid for by the public by the issuance of bonds; and that the payment of interest on the income bonds should not be interfered with by a requirement that replacements be paid for out of earnings and not out of capital.

This argument proves too much, for if it be sound, it would apply equally well to all replacement and maintenance charges. Badly worn track may be capable of additional service, and when renewed it would certainly give better service. If such improvement should be paid for by the public, and not from earnings, then track repairs, replaced yokes and new rails may be capitalized. If this process is legitimate, it may be applied to the whole system—power stations, car barns, conduits, cables and other equipment; and when one cycle of replacements has been completed, the company would have only one plant, but it would owe for two—the one which has disappeared and the one which exists. The balance sheet and the capital account would be false, for they would indicate that the company owns twice the property which it actually does. But the process need not stop with one cycle, for if it is proper to issue bonds to replace the old cars now about to be shelved, it will be proper to capitalize the cost of the cars which will replace the ones about to be purchased. Thus, bond issue may be piled upon bond issue without a corresponding increase in the property.

The end of such financiering may easily be imagined, but it need not be left to the imagination. The results are too well known from the experience through which the street railway lines in Manhattan have just passed. They were bad service, dilapidated plant and equipment, high operating expenses, judgments, receiverships, foreclosure, heavy assessments or loss of property, stockholders closed out, bonds paid off below par value, all corporations brought under suspicion, capital for legitimate enterprises obtained with difficulty, etc. Yet the very corporation which was reared upon the ruins of the Metropolitan system now comes before the Commission and asks that we fix the stamp of our approval upon the very practice which caused or aided the disruption of the Metropolitan system. It was to be supposed that something had been learned from experience. *The capitalization of operating charges must stop and replacements are operating charges.*

3. It has been urged that the company has no funds from which to pay the cost of replacing these old cars, that the payment of interest on the income bonds ought not to be interfered with, and that if replacements are to be charged against earnings, such interest (five per cent) cannot be paid. If interest cannot be paid without capitalizing replacements, the blame does not lie with the Commission or the public. It attaches to those who reorganized the company and who made such a course necessary. The reorganization plan was not approved by the Commission, but was carried through regardless of the finding of the Commission that the proposed capitalization exceeded the fair value of the property, and that the estimates of earnings submitted showed that the company would not earn a sufficient amount to pay all operating charges, interest on the first mortgage bonds and five per cent on the income bonds. (See *Metropolitan St. Ry. Co. Reorganization*, 3 P. S. C. R., 1st Dist., N. Y., 184.) Hence, if the company, notwithstanding the warning of the Commission, has issued bonds upon which it cannot truthfully earn interest, it must accept the consequences. The company cannot legally pay interest on income bonds until it has provided for replacements. The Commission has taken the position from the beginning that

capital must be kept intact out of earnings, and that provision must be made for depreciation and the ultimate replacement of all wasting assets. The uniform system of accounts, which has been in force since 1908, so provides, and similar provisions have been adopted by the Interstate Commerce Commission and the authorities in other states. A long list of citations from accounting authorities and court decisions could be given, but the following recent cases in the courts of this state will suffice. These are tax cases and in every instance a deduction is allowed from earnings for depreciation and the ultimate replacement of property.

- People ex rel. Jamaica Water Supply Co. v. Tax Commissioners*, 196 N. Y. 39.
People ex rel. Queens County Water Co. v. Tax Commissioners, 67 Misc. Rep. 490.
People ex rel. Third Avenue Railroad Co. v. Tax Commissioners, 198 N. Y. 608.
People ex rel. Brooklyn Heights Railroad Co. v. Tax Commissioners, 69 Misc. Rep. 646.
People ex rel. Manhattan Railway Co. v. Woodbury, 203 N. Y. 231.

As a matter of fact, the New York Railways Company has declared as earned and payable for the first six months interest on income bonds amounting to \$7.71 per bond, or a total of about \$236,000. In view of the terms of the adjustment mortgage and the need of the company for money to pay for replacements, it is doubtful whether this action is legal. But in any event, the company may not urge its necessities or poverty as reason for a bond issue when it is paying out money to income bondholders, which it ought to retain for the very purpose covered by this application.

PROPOSAL ILLEGAL.

Whatever may be the merits of the proposal, *the Commission has no legal power to authorize the issue of bonds for replacements.* The Court of Appeals has so decided in the case of *People ex rel. Binghampton Light, Heat & Power Co. v. Stevens*, 203 N. Y. 21-25. The company appealed from a decision of the Public Service Commission for the Second District, and Mr. Justice Chase speaking for the court says:—

“The amendment of the statute in 1910 gives to the commission authority to authorize the issue of stocks, bonds, notes or other evidences of indebtedness of a corporation payable at periods of more than twelve months after the date thereof for the discharge or lawful refunding of its obligations or for the reimbursements of moneys actually expended from income or from any other moneys in the treasury of the corporation not secured or obtained from the issue of stocks, bonds or other evidence of indebtedness of such corporation within five years next prior to the filing of the application, *but it expressly excepts from such authority of the commission the right to authorize the issue of such stocks, bonds or other evidence of indebtedness for maintenance of service and for replacements.** It also provides that the applicant for such permission must have kept accounts and vouchers in such manner as to enable the commission to ascertain the amount of money so expended and for the purposes for which the expenditure was made. The question as to what expenditures are a proper basis for permanent capitalization is an important one, always a proper and necessary subject for consideration, not alone by the directors of a corporation, but by any commission that has authority to grant or withhold its consent to the issue of new stock or bonds which are to become a part of the corporation's permanent capitalization.

“Wholly apart from the claim of the commission that this case must be determined upon the statute as it now exists, and assuming for the purpose of what we are here saying that the relator is right in claiming that this appeal must be determined upon the statute as it existed on the day when the original

* Not italicized in the original.

petition herein was filed, we are nevertheless of the opinion that *it was the duty of the commission to determine whether the stock and bonds proposed by the relator were to secure money to pay floating indebtedness incurred in the ordinary running expenses of the corporation.** Such determination by the commission would not be substituting the judgment of the commission for the judgment of the directors of the company in the management of its affairs at least if the directors of the company had wholly and intentionally ignored the self-evident proposition that except for special and extraordinary circumstances some part of the expenses of renewing machines and plant originally charged to capital account must be paid as a part of the operating expenses of a corporation from year to year. *We refer to the necessity of a corporation providing for some part of the expenses of renewing machinery and plant from year to year as self-evident, because it has been so considered and expressed by the courts in many cases.**

* * * * *

'It is said by the relator that the Public Service Commissions Law as it existed in 1909 did not make any distinction between expenditures for operating purposes and expenditures for permanent improvements, but provided generally for the issue of stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof when necessary *for the acquisition of property*, the construction, completion, extension or improvement of its plant or distributing system, or for the improvement or maintenance of its service *or for the discharge or lawful refunding of its obligations.* * * *

'The contention of the relator would enable any corporation to pay for labor, fuel and other supplies constituting the most ordinary of all operating expenses by obligations extending less than twelve months and then apply from time to time to the commission for authority to issue stock or bonds for the payment of such obligations and insist upon the same as a matter of right without limit.

'It will not be denied that fuel and such other materials as are consumed from day to day and the labor incurred in daily maintenance should be paid for from the earnings of the corporation as a part of its running expenses prior to the payment of interest upon bonds or dividends upon capital stock. A reasonable consideration of the interests of a corporation and the ultimate good of its stock and bondholders, and a regard for the investing public and that fair dealing which should be observed in all business transactions, require that machines and tools paid for and charged to capital account but which necessarily become obsolete or wholly worn out within a period of years after the same are purchased or installed, should be renewed or replaced by setting aside from time to time an adequate amount in the nature of a sinking fund or that by some other system of financing the corporation put upon the purchaser from the corporation the expense not alone of the daily maintenance of the plant but a just proportion of the expense of renewing and replacing that part of the plant which although not daily consumed must necessarily be practically consumed within a given time. If that is not done and renewals and replacements are continually added to the capital account the capital account must necessarily become more and more out of proportion to the real value of the property of the corporation.'

PROPOSAL CONTRARY TO MORTGAGE.

Each mortgage issued to secure the bonds of the company contains a provision which would be violated if the company were to charge the cost of replacements to capital as proposed. Section 12 of Article Third of the adjustment mortgage is pre-

*Not italicized in the original.

cisely the same as section 9 of Article Third of the first real estate and refunding mortgage and reads:

'At all times the Company will keep its said railroads, owned and leased, and the railroads of the auxiliary companies adequately equipped with cars and other equipment and rolling stock, and will maintain in good order and condition, reasonable wear and tear excepted, all such cars and other equipment and rolling stock, and whenever any such cars or equipment or rolling stock shall be worn out or be destroyed, the Company promptly will cause the same to be replaced by other cars or equipment or rolling stock of at least equal value and capacity, so that at all times the value and capacity of such cars and other equipment shall be fully kept up; and at all times the Company will set apart, use and apply for that purpose so much of the earnings of the property mortgaged and pledged hereunder as may be required for such maintenance and replacement of such equipment subject to the lien hereof.'

Two parts of these sections are peculiarly significant. The company agrees (1) to keep the roads equipped with rolling stock of a *value and capacity* at least equal to that at the time of taking over the property; and (2) to set apart for that purpose so much of the earnings as may be required for such maintenance and *replacement*. If the mortgages had omitted 'capacity' from (1), it is possible that they might not seriously conflict with the pending application, but as it stands, *the company must violate the mortgages in order to carry out its plans.*

AMOUNT TO BE CAPITALIZED.

The part of the application relating to the issue of bonds to purchase cars would be denied in its entirety were it not for one important factor not heretofore mentioned. The new cars will have greater capacity and will cost very much more than the cars to be displaced.

There are three standards by which to determine the amount which may be capitalized under such conditions: (1) Estimated cost to-reproduce-new of the old cars as compared with the new, (2) relative capacity, and (3) relative cost.

The first is the most uncertain and the most unsatisfactory. Opinions differ as to the estimated cost to reproduce the old cars in a new condition. In the Reorganization case, the company's expert gave an estimate of \$3,768 per car as of 1910. The Commission's Transportation Engineer estimated the cost in 1911 at \$3,376. Assuming the new cars to cost \$6,000 each, the amount that might be capitalized per car upon this basis would be \$2,232 according to the company's estimate and \$2,624 according to Mr. Connette's. And if the company is now actually capitalized according to the estimates of its own experts, the Commission may not allow new bonds to be issued for much more than \$2,232 per car.

The second standard is more scientific and less uncertain in its effects. The old cars seat 28 persons; the new, 51. As the number of standing passengers that may be carried is about in the same proportion, the capacity of the two is in the ratio of 28 to 51. Upon the basis of capacity, the amount which may be capitalized per car would be 23-51 of \$6,000, or \$2,706.

The third standard is the correct one to apply when accounts have been kept correctly, when they show the actual original cost of the displaced units, and when the replacements are different in type and capacity. In this case there are no such complete and accurate cost records, and the capital accounts are not differentiated as they should be. An attempt was made to determine the original cost of these cars but only a portion of the items going to make up the complete car could be traced. These amounted to \$2,398. Estimating those omitted, it is probable that each car could not have cost far from \$3,100 or \$3,200, and the amount which may be capitalized to represent the new rolling stock would be \$2,800 or \$2,900 per car.

The uniform system of accounts now in force for street and electric railways contains the following paragraphs:

'14. Replacements defined.—Replacements include all substitutions for capital exhausted or become inadequate in service, the substitutes having substantially no greater capacity than the things for which they were substituted. When a substitute has a substantially greater capacity than that for which it is substituted, the cost of substitution of one of the same capacity as the thing replaced should be charged as a replacement, and the remaining portion of the cost of the actual substitute should be charged as a betterment.

'20. Withdrawals or retirements.—When anything is withdrawn or retired from service, the amount at which such thing stood charged in the capital account shall be credited to the capital account in which it stood charged at the time of withdrawal, and the entry of such credit shall cite by name and page of the book or other record the original entry of cost of the thing withdrawn. If there is no such original entry, that fact shall be stated in connection with the credit entry, and the actual amount originally charged shall be credited. If such amount is not known, it shall be estimated, the facts upon which the estimate is based shall be shown, and the amount thus estimated to be the original charge in respect of such thing withdrawn shall be credited.

'22. Betterments involving partial destruction of thing bettered.—If any betterment involves the partial destruction or partial reconstruction of the thing bettered, only such portion of the cost of the change shall be charged as a betterment as will when added to the original cost (estimated if not known) of the thing bettered give the cost of reconstruction or replacement of the thing as bettered, and the remainder of the cost of the change (account being taken of any salvage) shall be charged to the appropriate repair account.

e. g., a building, original cost unknown but estimated to be \$15,000, is bettered by the construction of an elevator shaft, and its stairways are modified so as to be fireproof; the actual expenditure for these changes is \$3,000; the estimated cost of replacement of the building (as modified) with one equally serviceable and with an equal expectation of life is \$16,000; the charge to capital account as a betterment should be \$1,000, and the remainder (\$2,000) of the expenditure should be charged to the appropriate repairs account.'

The provision for a deduction from capital accounts on account of property withdrawn or retired from service is made specific in the definition of 'Fixed Capital, Dec. 31, 1908' (Account No. S100) and also in the definition of the depreciation account which is entitled 'Accrued Amortization of Capital' (Account No. 374):

'Credit to this account such amounts as are charged from time to time to "Operating Expense," or other accounts to cover depreciation of way and structures, depreciation of equipment, and other amortization of capital. When any capital is retired from service, the original money cost thereof (estimated if not known, and where estimated, that fact and the facts upon which the basis is estimated shall be stated in the entry), less salvage, shall (except as provided in the account "Fixed Capital, December 31, 1908,") be charged to this account. The amount originally entered or contained in the charges to any capital account in respect of such capital so going out of service shall be credited to such capital account, and any necessary adjusting entry made to the appropriate sub-account under the account "Corporate Surplus or Deficit".'

Once more, in the account entitled 'Depreciation of Equipment' (No. 760), which is the account provided among operating expenses for current charges to

accumulate a fund for the replacement of cars, machinery and other equipment, there is a similar requirement as to the deduction from capital account of the amount originally charged thereto for equipment retired from service.

These requirements should be followed in this matter, and in view of all the circumstances *the Commission will authorize the capitalization of \$2,800 per car.* If the cost of the new cars averages more or less than \$6,000, it will authorize the difference between \$3,200 and the average cost.

If the old cars can be sold for \$800 each, the net amount which must be provided from other sources will be \$2,400, or a total of \$420,000 for 175 cars. The company's balance sheet for June 30, 1912, and statement of income for the six months ending June 30, 1912, indicate that at that date there was in the depreciation reserve (Accrued Amortization of Capital) approximately \$323,000, representing the accumulations for six months. The accumulations of the four months subsequent to June will amount to approximately \$200,000. Thus there are ample funds to meet the demands indicated.

As the cost of the new cars is not definitely known, the plan adopted by the Commission in other cases will be followed here. The company will be authorized to issue bonds sufficient to raise about \$500,000, and the withdrawal of these funds will be authorized by the Commission from time to time as the expenditures are submitted and approved.

The plan submitted for the new cars do not show in detail what provision will be made for proper fenders or wheelguards. The officials of the company have assured the Commission, however, that all of the requirements of the orders of the Commission will be complied with and that a better wheelguard will be used than that required by such orders. But they have added that it would be impossible to present the designs in detail without delaying action by the Commission. Of course, the company cannot operate cars without adequate safety devices, and it should be stated that the authority given to issue bonds does not carry with it permission to operate the cars without such devices. If the company wishes to proceed without submitting plans for wheelguards and before they have been approved, it must do so at its own risk.

ADDITIONS TO CAR BARN.

The request of the applicants for permission to issue bonds to pay for the reconstruction of the 54th Street car barn involves the same questions that have already been discussed in relation to the acquisition of cars, and the same principles should be applied. The proposal is that the present roof and part of the structure shall be removed, that two additional stories and a new roof shall be added and that the total cost of these changes—\$550,000—shall be paid from the proceeds of a bond issue. It is evident that the portion of this expenditure which would represent replacements ought not to be charged to capital, and the principle that should be applied is the one laid down in paragraph No. 22 under 'Capital Accounts' in the uniform system of accounts, which has been quoted above.

There is one feature, however, which makes it impossible for the Commission at this time to decide whether bonds ought to be issued for any part of the proposed reconstruction. The company has a block of property bounded by 32nd and 33rd Streets and Fourth and Lexington Avenues. It is now used for the storage of cars, but a contract of sale has been entered into and the purchaser has already paid \$50,000. Title has not yet been transferred, but if the purchaser fulfils his part of the agreement and pays \$1,700,000 in addition, the company will give him possession by next May. If he fails to live up to his part of the contract, of course, no deed will be given, but the company has agreed to deliver this property for a total payment of \$1,750,000.

Obviously, the sale of this car barn and the reconstruction of the 54th Street car barn are closely related, for the addition of two floors to the latter would virtually be the replacement of the car barn at 32nd Street, and under the principles

already laid down, replacements may not be capitalized. If the company finally disposes of the 32nd Street property, even though it pays off the entire mortgage upon this real estate and another plot of ground, the company will have ample funds with which to pay for all of the additions to the 54th Street car barn without issuing any bonds—the total selling price being \$1,750,000, the entire mortgage \$950,000, and the difference \$800,000.

It is entirely practicable to finance the car-barn additions without a present issue of bonds. According to the testimony, it would take about six months to add the two stories, and no payments will be made before spring. As the company will know by the end of May whether the option of purchase will be exercised, there will be only a brief time during which the cost of the work must be financed, and this can be done either from the income of the property or by short-time loans. If the property is not sold and funds are available from no other source, the principles enumerated as to the acquisition of new cars will be applied to this part of the application.

In the Matter of the Petition of the MID-CROSTOWN RAILWAY COMPANY, INC., for authorization to issue and deliver to the Bondholders' Committee of the 28th and 29th Streets Crosstown Railroad Company certain stocks and bonds.

Case No. 1507.

Reorganization of Corporations—Joinder of Application for Reorganization with Application for Acquisition of the Proposed Securities by Another Corporation.—An application for permission to a street railroad corporation, which had no authority to issue capitalization, to acquire the stock and bonds of another corporation about to be organized under the reorganization statutes, should be made by the acquiring company itself and will be considered in view of the facts which appertain to such a question. An application of a bondholders' reorganization committee for the approval of a plan of reorganization of a street railroad corporation and the issue of securities thereunder should not include the matter of the acquisition of such securities by another corporation.

Reorganization of Corporations—Issuance of Stock and Bonds—Party to Apply for Approval—Expression of Commission's Views in Advance of a Determination.—Upon a reorganization of a street railroad corporation, the issuance of capitalization should be finally determined by the company intending to issue the securities or its representatives, but, upon application of a bondholders' committee in anticipation of the reorganization, the Commission will render an opinion without issuing an order, after hearing the evidence, indicating along what lines and in what amounts the new corporation would be authorized to issue capitalization.

Reorganization of Corporations—Law Governing—Amendment of Law Intermediate Incorporation of New Company and Filing of Petition with the Commission—Reorganization and Capitalization Subject to Supervision and Control of Commission.—Where a corporation was reorganized pursuant to S.C.L., §§ 9 and 10, prior to the amendment of the P.S.C.L. by the addition of § 55-a, placing such reorganization under the supervision and control of the Commission, an application by the new corporation for authority to issue capitalization to carry out such reorganization filed after the taking effect of the amendment is governed by the law as amended.

Reorganization of Corporations—Issuance of Stock and Bonds—Elements to be Considered in Determining Capitalization by New Corporation.—The factors which must be considered in the case of a reorganization under the P.S.C.L., § 55-a

are: (1) Fair value of the property involved; (2) original cost of construction; (3) duplication cost; (4) present condition; (5) earning power at reasonable rates; (6) additional sum actually paid in cash, and (7) all other relevant matters.

Reorganization of Corporations—Issuance of Stock and Bonds—Issuance of Proposed Capitalization Not Justified.—The applicant was organized under the S.C. L., §§ 9 and 10, to take over the property and franchises of T. & T. S. C. R. R. Co. and applied for authority to issue \$500,000 capital stock, \$200,000 first mortgage fifty-year five (5) per cent bonds and \$300,000 fifty-year non-cumulative adjustment income five (5) per cent bonds, to be delivered to a bondholders' committee of the T. & T. S. C. R. R. Co. in exchange for the property of the company which had been purchased by the committee. The Commission finds that, upon the basis of cost to reproduce the physical property in a new condition less depreciation and plus preliminary and development expenses, cost of property owners' consents, franchises and permits, interest and taxes during construction, organization expense of new company, current assets, etc., the fair and reasonable value of the property does not exceed \$165,000 for property owned and operated and \$180,000 if property owned but not operated were included; that the earning power of the property at reasonable rates is not sufficient to enable the new corporation to pay all operating charges if the system were operated as a separate unit; that the power of the property to earn a profit, if operated in connection with a larger system, is uncertain; that the bonds alone would exceed the fair value of the property viewed from any standpoint, and that there is no evidence to justify the issuance of \$500,000 bonds and \$500,000 stock. HELD, that the application should be denied.

Valuation—Fair Actual Value—Title to Property Involved.—In determining the fair value of the property involved upon a reorganization it is essential first to determine what property the new company will take over, and, while the Commission will not finally decide the question of disputed ownership, the claims and facts of record will be examined and passed upon.

Valuation—Fair Actual Value—Title to and Interest in Tracks.—Upon the evidence the Commission finds that there is reasonable certainty that enumerated tracks would be owned in their entirety by the new company, that there is no substantial evidence to support the applicant's claim to other lines, that the ownership of some tracks has not been satisfactorily established, and that, although the company may have title to certain other tracks, it would have no beneficial interest in them. HELD, that the tracks not owned or in which the company would have no beneficial interest should be omitted from the cost to reproduce new or the duplication cost of property presented as the basis for capitalization.

Valuation—Original Cost of Construction.—No records of the original cost of construction were produced by the applicants, and, upon examination of the proof, it is considered that the evidence of the amount of capitalization of the company to be reorganized and of the purchase price paid for its property upon a foreclosure a number of years previously, throws little light upon the subject.

Valuation—Duplication Cost—Cost to Reproduce New—Applicant's Estimate Excessive.—The applicant submitted an appraisal of the cost to reproduce new of the property at \$405,870 for the tangible property and \$304,433 for the intangible property, making the total \$710,303, including tracks which the company was not using or to which its title was doubtful or in which it had no beneficial ownership, as compared with an appraisal by the Commission's engineers at \$174,293, including \$12,569 for property owned but not operated and including allowances for engineering, administration, contingencies, incidentals, contractors' profits, etc. HELD, that the applicant's appraisal should not be adopted.

Valuation—Duplication Cost—Cost to Reproduce New—Intangible Property—Overhead Charges.—An estimate of over 50 per cent of the entire valuation of property, used as a basis for capitalization, for overhead charges and intangible property is most unusual.

Valuation—Duplication Cost—Term Used in P. S. C. L., § 55-a, Involves Present Condition.—The term "duplication cost" used in P. S. C. L., § 55-a, among the factors to be considered in determining the capitalization upon a reorganization, means the cost of duplicating the property as it exists at the time of appraisal and not as it might be if it were new throughout.

Valuation—Present Condition—Allowance for Depreciation.—An appraisal of property which does not make allowance for depreciation, including obsolescence and inadequacy, is inconclusive.

Valuation—Duplication Cost—Cost to Reproduce New—Intangible Property—The estimate submitted by applicant of the value of intangible property at \$304,433 was not shown to be based on experience or actual expenditures or records of cost, but involved the assumption of the greater cost of securing its rights under increased statutory restrictions since the time when they were originally acquired. HELD, that the applicants in a proceeding involving the issuance of securities are not entitled to capitalize what their rights granted a long time previously are worth as compared with rights obtained under present statutory restrictions, and thereby capitalize the development of public control.

Valuation—Duplication Cost—Cost to Reproduce New—Intangible Property—Duplication of Items in Appraisal.—In an appraisal of duplication cost of property, items for engineering, general superintendence and administration should not be included both under the valuation of tangible property and under the valuation of intangible property.

Valuation—Duplication Cost—Cost to Reproduce New—Intangible Property—Consents Not Possessed.—In an appraisal of duplication cost of property, consents and certificates which the company does not possess should not be included.

Valuation—Duplication Cost—Cost to Reproduce New—Intangible Property—Organization Charges of Old and New Corporations.—As the new corporation will not take over the corporate organization of the old corporation but will have its own organization expenses, the estimated expenses connected with the establishment of the old corporation should be omitted from an appraisal of the intangible property to be taken over on reorganization, or the expenses connected with the establishment of the new corporation should be considered as an offset.

Valuation—Duplication Cost—Cost to Reproduce New—Intangible Property—Consents of Property Owners.—The applicant estimated the cost of procuring property owners' consents at \$2.50 per curb foot on each side of the street, based on an actual average cost of \$1 per foot on certain streets on another system. HELD, that an allowance of even an average of \$1 per foot of property abutting upon track is probably too high, in view of the cost of such work in recent years.

Valuation—Duplication Cost—Cost to Reproduce New—Intangible Property—Working Capital.—The old company had no working capital. HELD, that, as the new company would have no assets to represent an allowance for working capital, it should not be included in the valuation of the property to be acquired.

Valuation—Duplication Cost—Cost to Reproduce New—Intangible Property—Credit Not Working Capital.—An officer of the T. A. Ry. Co., which proposed to

acquire the securities of the new corporation, was extending his credit to the receiver of the old corporation to enable the operation of a car service. HELD, that this credit cannot be considered as working capital to be included in an appraisal of the property presented as the basis for capitalization.

Valuation—Duplication Cost—Cost to Reproduce New—Intangible Property—Interest and Taxes during Construction Period.—In determining the amount to be allowed for interest and taxes during construction period, upon an appraisal of a street railroad. HELD, that the facts justified an assumption that the construction period would last six months and that taxes would probably not accrue on property other than real estate until operation had begun.

Issuance of Stocks and Bonds—Amount of Capitalization Issuable—Uncertainty Involved in Capitalization Based on Earnings at Reasonable Rates.—Uncertainty must arise from an attempt to base capitalization upon earnings, particularly earning power at reasonable rates, because, in determining reasonable rates, the fair value of the property must be considered, and fair value of the property capitalizable is in turn to be based upon reasonable rates. Furthermore, earnings fluctuate as conditions change, even though the rates remain stationary, and it might be questioned whether the capitalization of a company should not fluctuate correspondingly.

Issuance of Stock and Bonds—Amount of Capitalization Issuable—Relation of Earnings to Amount of Bonds—Banking Practice.—Bonds should not be issued in excess of the amount upon which the property will regularly and with reasonable certainty earn interest, after paying all operating charges, including reserves for depreciation, etc., and amortization; and it is a banking practice to require that interest payments shall not exceed one-half or two-thirds of the net earnings after paying the net charges.

Issuance of Stock and Bonds—Amount of Capitalization Issuable—Sufficiency of Earnings at Reasonable Rates to Pay Interest and Dividends.—An analysis of the data presented upon an application for authorization of the capitalization to be issued upon a reorganization indicated that (1) the receipts from horse-car operation at a five cent fare as a separate system would not pay all operating charges; (2) an increase in the rate of fare, even if permitted by law, would be unremunerative and impracticable; (3) the lines may be made to pay expenses if operated in connection with a larger system under an arrangement for free transfers; (4) the power of the property to earn a profit even under such an arrangement is uncertain. HELD, that from the viewpoint of earning power the proposed capitalization should not be authorized.

Issuance of Stock and Bonds—Amount of Bonds Issuable—Relation between Value of Property and Amount of Proposed Bond Issue.—Where capitalization is proposed to be issued on the reorganization of a street railroad corporation and the bonds alone would exceed the fair value of the property, such capitalization should not be authorized.

Issuance of Stock and Bonds—Amount of Capitalization Issuable upon Reorganization—Amount Dependent upon Liabilities to be Assumed.—Upon a reorganization, the amount of the liabilities of the old corporation which must be met by the reorganization corporation should be deducted from the assets to be acquired before determining the amount of capitalization to be authorized.

Reorganization of Corporations—Purpose of Reorganizing—Dummy Corporations not Favored.—The applicant, a new corporation formed to reorganize an existing corporation to take over its assets, asked for the authorization of an issue of securities to carry out such reorganization; it was, however, the expressed intention of the

applicant to transfer the property to the T. A. Ry. Co., a street railroad corporation, by the latter's purchase of the applicant's stock and bonds of the par value of \$1,000,000 for about \$412,000 and the assumption of about \$164,000 liabilities. HELD, that dummy corporations are not viewed with favor by the Commission, for their existence is usually detrimental to the public welfare, and that the T. A. Ry. Co. should purchase the property outright.

Issuance of Stock and Bonds—Capitalization Allowable on Purchase of Street Railroad Property.—The determination by the Commission of the amount of capitalization issuable by the reorganization corporation does not involve the reasonableness of the purchase price to be paid by the T. A. Ry. Co. upon a transfer to it of the property of the old corporation, and the matter of the capitalization by the T. A. Ry. Co. of such property is not determined in this proceeding.

Hearings closed October 29, 1912. Opinion adopted November 1, 1912.

The Mid-Crosstown Railway Company, Inc., was incorporated by a certificate filed on February 14, 1912, pursuant to Sections 9 and 10 of the Stock Corporations Law, as a reorganization of the Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company.

On May 17, 1912, a petition dated and verified May 10, 1912, was filed with the Commission by the Mid-Crosstown Railway Company, Inc., asking that, in contemplation of the reorganization of the Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company and the purchase by the Third Avenue Railway Company of the securities of the reorganized corporation and of the applicant, the applicant be authorized to issue 5,000 shares of common capital stock of the par value of \$100 each, \$200,000 par value of first mortgage five per cent bonds, and \$300,000 par value of adjustment income mortgage five per cent bonds, or, in lieu of these bonds, \$500,000 par value of first mortgage five per cent bonds, which were to be delivered to a bondholders' reorganization committee of the Twenty-eighth and Twenty-ninth Streets Crosstown Railway Company for the property and franchises of the latter corporation which had been acquired by or for the committee upon a foreclosure sale. On the hearing, counsel for the applicant withdrew the alternate request for the issuance of \$500,000 bonds, but prosecuted the part of the application for the issuance of the stock and the two classes of bonds.

Between the date of the filing of the applicant's certificate of incorporation and the date of the filing of the petition with the Commission, the Public Service Commissions Law was amended by the addition of § 55-a, which went into effect April 12, 1912, placing reorganizations of such corporations subject to the supervision and control of the proper commission.

The Order entered on November 1, 1912, in pursuance of the Opinion, denied the application for authority to issue stock and bonds in the amounts above specified.

The further facts appear in the Opinion adopted.

Harry M. Chamberlain, for the Commission.

Abraham S. Gilbert, for the Mid-Crosstown Railway Company, Inc.

MALTBIE, Commissioner: The Mid-Crosstown Railway Company, Inc., is a street railroad corporation formed by reorganization certificate filed on February 14, 1912, in the office of the Secretary of State of the State of New York, pursuant to Sections 9 and 10 of the Stock Corporation Law, for the purpose of taking over the property and franchises of the 28th and 29th Streets Crosstown Railroad Company.

CORPORATE HISTORY.

The 28th and 29th Streets Crosstown Railroad Company was incorporated in 1896 and acquired the property and franchises of the 28th and 29th Streets Railroad Company which had been sold on foreclosure. On or about December 1, 1896, the

28th and 29th Streets Crosstown Railroad Company made and issued its first mortgage five per cent gold bonds in the amount of \$1,500,000, and for the purpose of securing the payment of the principal and interest of said bonds, maturing in 100 years, made and executed a mortgage or deed of trust to the Central Trust Company of New York, as Trustee, covering all its property and franchises of every nature and description whether then owned or afterward to be acquired, all its equipment and personalty, all its lands, buildings and real estate in the City of New York and elsewhere, and all its railroads, railroad properties and franchises to operate railroads described in the municipal consent granted to its predecessor by the City of New York. The company also issued \$1,500,000 of stock, making a total capitalization of \$3,000,000.

About the time the 28th and 29th Streets Crosstown Railroad Company was organized, an agreement for the operation of the road was entered into with the Metropolitan Street Railway Company. The road was operated by the Metropolitan Company, its lessees and receivers as a part of the Metropolitan system until October 1, 1908, at which time the operating agreement was abrogated. The company failed and neglected to pay the interest due on the coupons of said date, and thereafter, in an action brought by the Central Trust Company of New York, as Trustee, against the said Crosstown Company, to foreclose the mortgage aforesaid, Mr. Joseph B. Mayer was appointed receiver of the property of the Crosstown Company by an order of the Supreme Court of the State of New York, to hold the said mortgaged property and operate the railroads of the Crosstown Company until the further order and determination of the Supreme Court.

On July 22, 1908, in anticipation of the default in the payment of interest above mentioned, Mr. John W. Hamer and others were constituted a committee for the bondholders of the said Crosstown Company under an agreement with each bondholder who deposited his bonds thereunder, and a large proportion of the outstanding bonds (\$1,279,000 out of \$1,500,000) were deposited with this committee.

PRIOR APPLICATION.

On or about February 9, 1911, this committee entered into an agreement with the Third Avenue Railway Company, under which agreement the Third Avenue Railway Company promised to pay to said committee for the bonds so deposited thirty per cent of their par value and also guaranteed to reimburse the committee for certain sums which had been advanced or expended for the reorganization and readjustment of the Crosstown Company, including moneys advanced by the committee to the Receiver for the operation of the road, compensation of the committee for their services and a proportion of certain other sums if collected, the right to recover such sums being in litigation, and also certain other sums for purposes specified in said contract. The Committee of Bondholders agreed among other things that the 28th and 29th Streets Crosstown Railroad Company should be reorganized and should issue its new stocks and bonds, which stocks and bonds would be taken over by the Third Avenue Railway Company.

Under date of June 7, 1911, nearly three years after the formation of the Committee of Bondholders, and four months after the date of the above agreement, an application was made by said Committee to this Commission for the approval of the said agreement with the Third Avenue Railway Company and for the authorization by the Commission of the reorganization of said 28th and 29th Streets Crosstown Railroad Company, as provided in said contract, and for the authorization by the Commission of the issuance by such new company of its capital stock and bonds in the amounts and for the purposes specified in said contract.

This matter (Case No. 1357) was brought on promptly for hearing before the Commission, but was not prosecuted vigorously by the applicants, and was adjourned from time to time at their request. On the hearing it was pointed out to the petitioners by the residing Commissioner that although the matters involved in the

petition had a certain relation to each other, yet in a sense they were somewhat disconnected; that the purchase of stock or bonds by the Third Avenue Railway Company, a new corporation which had not yet received authority to issue any stock or bonds from this Commission, was a matter which would need to be taken up on application of the Third Avenue Railway Company, that being the Company that would purchase securities; and that when such application should be made, it would need to be considered in view of the facts that appertain to such a question. It was pointed out also that the issuance of stocks and bonds by a new company, which would acquire at foreclosure sale the property of the 28th and 29th Streets Crosstown Railroad Company, would naturally be determined finally and lastly by an application by the company which intended to issue the securities or by a reorganization committee representing the new company before it was organized, and that therefore, technically speaking, it would be impossible for the Commission to issue orders on the application as it then stood. However, the petitioners were informed that if they desired merely to ascertain along what lines and in what amounts the Commission would permit a new company to issue securities, an opinion might be issued without any order after hearing the evidence, and that if the petitioners desired to pursue that course, they might present such facts as they desired.

After considerable delay and after the case had been adjourned from time to time, the petitioners introduced as witnesses Mr. Frederick W. Whitridge and Mr. Henry Floy, the testimony of Mr. Henry Floy having reference to the cost to reproduce new the physical property of the 28th and 29th Streets Crosstown Railroad Company, and the testimony of Mr. Whitridge having reference among other things to the earning power of the road and the cost of operation.

On January 30, 1912, counsel for the petitioners stated to the Commission that as it was apparent that the matter of the proposed agreement with the Third Avenue Railway Company could not be decided in the proceeding then pending, and that as there was about to be organized a new company to be known as the Mid-Crosstown Railway Company Inc. to take over the property and franchises of the 28th and 29th Streets Crosstown Railroad Company, they had decided to withdraw the application. Thereupon, Case No. 1357 was closed, and the proceeding dismissed.

NATURE OF PRESENT APPLICATIONS.

After the organization of the Mid-Crosstown Railway Company, Inc. (February 14, 1912), some time elapsed before further application was made to the Commission in the matter of a proposed issue of stock and bonds by the new company. The petition by the new company was dated and verified May 10, 1912. It was not entirely clear just what securities the new company desired to issue, but finally on the hearing, counsel for the company stated that it desired authority to issue \$500,000 of capital stock, \$200,000 of first mortgage 50-year five per cent gold bonds and \$300,000 of 50-year five per cent non-cumulative adjustment income bonds, such stock and bonds to be delivered to the Bondholders' Committee of the old 28th and 29th Streets Crosstown Railroad Company, the road having been bid in by said committee on foreclosure sale, and having been conveyed to them by the referee who conducted the sale. Counsel for the company stated also that the new stock and bonds would be sold for cash to the Third Avenue Railway Company.

An application has been made by the Third Avenue Railway Company for authority to purchase and acquire such stock and bonds (Case No. 1521). The petition in that case was verified June 18, 1912, and hearings upon that application were immediately instituted. However, in view of the fact that the result of the hearings in that case would be dependent upon the result of the hearings had in the matter of the application of the Mid-Crosstown Company for authority to issue such stock and bonds (Case No. 1507), the hearings in Case No. 1521 have been adjourned from time to time to await the determination of Case No. 1507. From the petition in Case No.

1521, it appears that the Third Avenue Railway Company intends to temporarily finance the proposed purchase by borrowing the necessary money upon its promissory note or notes payable not more than one year from the date thereof. It appears also that the amount to be paid is an amount representing thirty per cent of the par value of the first mortgage bonds of the Crosstown Company as provided in the above mentioned contract of February 9, 1911, and also other sums of money to be paid as specified in said contract. It appears also that at the time the petition was verified, \$1,373,000 par value of the first mortgage bonds of the Crosstown Company out of a total issue of \$1,500,000 had been deposited with the bondholders' committee of the Crosstown Company.

LAW APPLICABLE TO THIS CASE.

In *People ex rel. Third Avenue Railway Company v. The Public Service Commission for the First District* (203 N. Y. 299), decided November 21, 1911, the Court of Appeals held that under Section 55 of the Public Service Commissions Law, as that section then stood, a corporation growing out of a plan of reorganization might issue securities up to the amount of the securities issued by the old corporation and any new money that might be put into the enterprise. However, by Chapter 289 of the Laws of 1912, which became a law April 12, 1912, the Public Service Commissions Law was amended by the addition of a new section, after Section 55, to be Section 55-a, as follows:

‘§ 55-a. Reorganizations. 1. Reorganizations of railroad corporations, streets railroad corporations and common carriers pursuant to sections nine and ten of the stock corporation law and such other laws as may be enacted from time to time shall be subject to the supervision and control of the proper commission and no such reorganization shall be had without the authorization of such commission.

2. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the commission which, in making its determination, shall not exceed the fair value of the property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash, provided, however, that the commission may make due allowance for discount of bonds, Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the commission.

The present application was not made until about a month after the amendment mentioned became a law, and is certainly governed by the provisions of Section 55-a. Counsel for the petitioners suggests that as the new company was organized and incorporated prior to the enactment of the amendment mentioned, the company has a right to issue stocks and bonds in any amount it may choose within the limits pointed out in the Third Avenue decision without reference to the fair value of the physical property of the company; and that although the company's application was not made until after the law was amended, nevertheless the amendment has no application to the situation. It should be noted that the company had ample opportunity to reorganize in accordance with the law as interpreted in the Third Avenue decision and to issue securities regardless of the fair value of the property, for the amendment did not become a law until April 12, 1912. However, counsel for the applicants has not pressed this claim, for he states that the amount of capitalization is immaterial to them, except so far as it affects the sale of the property, that their primary purpose is to sell the property to the Third Avenue Company, and that

the Commission's approval is desired wholly apart from any legal technicalities. Consequently, the applicants introduced evidence as to the cost to reproduce the physical property in a new condition and as to earnings and certain other relevant matters.

PROPERTY TO BE ACQUIRED.

Under the amendment of 1912, the amount of capitalization upon reorganization may "not exceed the fair value of the property involved." It is, therefore, essential to determine first what property the new company will take over. In the appraisal presented by the applicants, there was included a large amount of track not owned by the company at all and certain other portions which while perhaps technically "owned" are not used by the company and for physical reasons cannot be used by the company as the lines are now constructed and for the use of which the company receives no rental; and in one case even if there were a physical connection so that it would be possible for this company to use the tracks, it could not use them without making arrangements with another company for such use. Although the Commission can not finally decide the question of disputed ownership, it is necessary to examine the claims of the company and the facts of record.

The company claims to own tracks in the following streets, the lines being in each case, except where otherwise stated, single track surface construction:—

28th Street from Second Avenue to Eleventh Avenue.

29th Street from Second Avenue to Eleventh Avenue.

Eleventh Avenue from 29th Street to 28th Street.

Eleventh Avenue from 28th Street to 24th Street, double tracks.

West 24th Street from Eleventh Avenue to and across Thirteenth Avenue to the North River, double tracks.

East 24th Street from First Avenue to Avenue A, double tracks.

East 33rd Street and private property from First Avenue to the 34th Street Ferry, double tracks.

West 34th Street from Tenth Avenue to the North River, double tracks, partly surface and partly underground electric construction.

28th Street from First Avenue to Second Avenue.

29th Street from First Avenue to Second Avenue.

First Avenue from 28th Street to 29th Street.

First Avenue from 29th Street to 34th Street, double tracks.

Of these lines there seems to be reasonable certainty that the first six would be owned in their entirety by the new company; but there seems to be no substantial evidence to support the applicants' claim to the other lines.

The company also claims to own an undivided one-half interest in the following lines, which have double tracks and underground electric construction in each case:—

Marginal Street (in place of old Thirteenth Avenue) from 14th Street to 22nd Street.

West 22nd Street from Marginal Street to Thirteenth Avenue.

The evidence with reference to this claim clearly indicates that although the company may have title to these tracks, it is not possessed of any beneficial interest in them. The evidence shows that the original tracks in Thirteenth Avenue, between 24th and 14th Streets, were completed about 1895 or 1896 by the 28th and 29th Streets Railroad Company, and that the 28th and 29th Streets Crosstown Railroad Company in its first report to the Railroad Commission, for the year ending June 30, 1897, listed the tracks on Thirteenth Avenue as 'dead track.' It appears from the evidence that subsequently the tracks were operated by the company or its lessees, and that in 1901 when the city was about to commence to improve on the North River waterfront,

between 14th and 23rd Streets, a stipulation was entered into by which the city was permitted to remove the tracks on Thirteenth Avenue on condition that it should replace them on the new Marginal Street, and that the company's franchises and privileges should be in no manner impaired or prejudiced by such removal and subsequent replacement. It appears also that prior to the waterfront improvement just mentioned, the Bleecker Street and Fulton Ferry Railroad Company had a double track on what was then Eleventh Avenue between 23rd and 14th Streets, and that subsequent to the construction of the new Marginal Street only two tracks, and these of underground electric construction, were laid in Marginal Street and West 22nd Street in place of the four tracks removed by the city. The evidence shows that the cost of the construction of the tracks on Marginal Street was charged by the Metropolitan Street Railway Company to the Twenty-eighth and Twenty-ninth Streets Crosstown Company to the amount of \$56,940.81 up to April 30, 1907. It appears also that for some years these tracks have been used exclusively by the Metropolitan Street Railway Company or its successors, and that there is no physical connection on Thirteenth Avenue between these underground electric tracks at 22nd Street and the surface tracks of this company at 24th Street, leaving a distance of about two blocks unconstructed. It also appears that on July 22, 1910, an agreement was entered into between the Crosstown company, its receiver and the Metropolitan Street Railway Company and its receivers, in settlement of a suit which had been commenced by the Crosstown company's receiver against the Metropolitan receivers. The following points were established by the terms of this agreement:

1. This company's undivided one-half ownership of the tracks in question is admitted by the Metropolitan Company, but the Bleecker Street Company does not join in the admission.

2. An undivided one-half ownership of these tracks by the Metropolitan and Bleecker Street companies is admitted by this company.

3. The right of the Metropolitan Company to the use of the tracks without rental is admitted by this company.

4. The right of this company to use the tracks jointly with the Metropolitan Company is admitted by the Metropolitan, but only on condition that before such use begins an agreement shall be entered into between the parties, fixing the terms upon which this company may use the tracks, and in case of dispute the matter is to be determined by arbitration.

5. For the advantages gained by the Metropolitan Company through this agreement, its receivers paid the Crosstown Company's receiver \$10,000.

It is obvious that this company's ownership of a one-half interest in the tracks has not been satisfactorily established. The Company does not use the tracks, gets no rental for their use, and has entered into a contract under which it cannot use the tracks without making terms with another company for such use. Moreover, if it had the right to use the tracks, it could not do so for the reason that there is no physical connection between these tracks and those operated by the company. Furthermore, the Bleecker Street Company, which is the lessor of the Metropolitan Company, now the New York Railways Company, on the Marginal Street and West 22nd Street has not joined in the agreement, and if the lease of the Bleecker Street Company to the Metropolitan Company should be abrogated, the Bleecker Street Company might repudiate the agreement entirely. Under such circumstances, the proposition that the applicant company acquired any interest in the tracks in question is negated by the very contract that brings such a situation into existence.

The ownership of the tracks in West 34th Street, partly surface and partly underground electric construction, between Tenth and Twelfth Avenues, is even more in doubt. While there is some evidence that this company's predecessor claimed to have commenced the construction of its line by laying these tracks in West 34th Street about twenty-five years ago, it appears from the reports to the Railroad Com-

mission that franchises covering this route were granted to the Thirty-fourth Street Railroad Company and The Thirty-fourth Street Ferry and Eleventh Avenue Railroad Company prior to this company's grant. It also appears from the reports of the Thirty-fourth Street Railroad Company and the Thirty-fourth Street Ferry and Eleventh Avenue Railroad Company, its lessee, for the year 1895, and from the report of the Thirty-fourth Street Crosstown Railway Company, successor of the two companies just mentioned, for the years 1896 and 1897 that these companies claimed the ownership of tracks in 34th Street, including the tracks between Tenth and Twelfth Avenues, while the reports of the Twenty-Eighth and Twenty-Ninth Streets Railroad Company and of the Twenty-Eighth and Twenty-Ninth Streets Crosstown Railroad Company, its successor, for the same years do not include any claim of ownership of these tracks. It also appears from the evidence that permits for the electrification of the tracks on 34th Street, including specifically the tracks between Tenth and Twelfth Avenues, were issued by the Borough President in 1903 to the Thirty-fourth Street Crosstown Railway Company, with specific reference to that company's original franchise of 1884, and to an order of the Board of Railroad Commissioners dated August 10, 1898, authorizing the Thirty-fourth Street company to change its motive power to underground electric current upon its route, including this street. It also appears from the evidence that although a charge of \$36,873.33 was made by the Metropolitan Street Railway Company against the Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company for the change of motive power on 34th Street between Tenth Avenue and the North River, the Twenty-eighth and Twenty-ninth Streets Company had no authority from the Board of Railroad Commissioners to change its motive power to underground electric current on any portion of its route prior to January 15, 1907, three or four years after permits of the Highway Department covering West 34th Street had been issued to the other company. Moreover, while there is some slight ambiguity in the language of two orders by the Board of Railroad Commissioners issued in 1907 and dated January 15 and January 29, respectively, the Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company's applications, upon which these orders were based, did not include West 34th Street in the routes described. There appears to be, accordingly, no doubt that this company never received any authorization that could be construed as covering the tracks on West 34th Street. Moreover, the evidence shows that these tracks are not used by this company, that they are not physically connected with the other portions of this company's line, that they are used in part at least by another company, and that this company receives no rental therefor. The evidence is clearly against this company's ownership of these tracks, and under all the circumstances its claim of ownership cannot be considered as constituting a basis for the issuance of securities.

In regard to the surface tracks on 33rd Street and private property between Avenue A and the East 34th Street Ferry, the evidence shows that this company's franchise was for an alternative route between the intersection of First Avenue and 33rd Street and the ferry. The company was authorized to continue up First Avenue to 34th Street, and thence through 34th Street to the ferry, or, in lieu thereof, to go through 33rd Street and private property. The evidence shows that a franchise was granted to the Thirty-fourth Street Ferry and Eleventh Avenue Railroad Company covering the route on 33rd Street and private property about one year prior to the grant of this company's franchise, and that in 1895, 1896 and 1897 the reports of the Thirty-fourth Street Ferry and Eleventh Avenue Railroad Company and its successor, the Thirty-fourth Street Crosstown Railway Company, claimed the ownership of these tracks, while for the same years the Twenty-eighth and Twenty-ninth Streets Railroad Company and its successor did not claim them. Moreover, this company's predecessor back in 1887 entered into a track agreement with the Central Park, North and East River Railroad Company for the use of the latter company's tracks on First Avenue all the way from 24th Street to 34th Street, and in January, 1897, about three months after the Twenty-eighth and Twenty-ninth Streets line was put into operation, the company entered into an agreement with the Dry Dock, East

Broadway and Battery Railroad Company for the use of the curves turning from First Avenue into 34th Street to connect with tracks leading to the ferry. While it is admitted that the Twenty-eighth and Twenty-ninth Streets horse cars were subsequently operated for a number of years through 33rd Street and private property by the Metropolitan Company, the evidence shows that the company's cars are no longer operated on these tracks. The weight of evidence appears to be strongly against this company's ownership of them.

In regard to the tracks on First Avenue between 28th and 34th Streets, it is shown by the evidence that long prior to the grant of this company's franchise the Central Park, North and East River Railroad Company, the Dry Dock, East Broadway and Battery Railroad Company and the Avenue C Railroad Company, or their predecessors, had received legislative franchises for double tracks at this point. It is also shown that this company's predecessor, as far back as 1887, when it was first commencing the construction of its route, entered into an agreement with the Central Park, North and East River Railroad Company for the right to use the latter's tracks between 28th and 34th Streets.

So far as the tracks on 28th and 29th Streets between First and Second Avenues are concerned, the evidence shows that in 1892 this company's predecessor instituted proceedings in court to compel the Twenty-third Street Railway Company, owner of these tracks, to permit their use as connecting portions of this company's line under what was then Section 102 of the Railroad Law, commonly known as the one-thousand foot provision, and that by decree filed May 19, 1896, Justice Truax awarded to this company the right to use the tracks of the Twenty-third Street Railway Company and its lessee on the portions of 28th and 29th Streets referred to, and on the short block on East 23rd Street between Avenue A and the ferry, for an annual rental of \$98,836, payable semi-annually in advance. There was no evidence offered to show that this rental was ever paid, and on the other hand there was no evidence offered showing a transfer of title of these tracks from the Twenty-third Street Railway Company to this Company or to any other. The applicant conceded that the tracks had been constructed and were in operation prior to the granting of the Twenty-eighth and Twenty-ninth Streets Railroad franchise. The only proof offered in support of this company's claim to the present ownership of the tracks was the testimony of a former engineer of the Metropolitan Street Railway system to the effect that he had rebuilt these tracks, together with other tracks on 28th and 29th Streets, in the year 1900, but he also testified that he had no knowledge as to their ownership before or after reconstruction. Moreover, the terms under which this company's predecessor secured the right to use the tracks on 28th and 29th Streets between First and Second Avenues are so onerous as to be prohibitive and to render the right entirely valueless.

Inasmuch as the company lays no claim to the ownership of tracks on portions of its original route not included in the above description, it is unnecessary to take up the question of its rights with reference to the omitted portions of its route.

To summarize: There seems reasonable certainty that the following lines are owned by the old company and would pass to the new, all of which are now being operated:—

28th Street from Second Avenue to Eleventh Avenue.

29th Street from Second Avenue to Eleventh Avenue.

Eleventh Avenue from 29th Street to 28th Street.

Eleventh Avenue from 28th Street to 24th Street, double tracks.

West 24th Street from Eleventh Avenue to and across Thirteenth Avenue to the North River, double tracks.

One other is probably owned, but it is not now being operated. It is the line on—

East 24th Street from First Avenue to Avenue A, double tracks.

These are the only lines to which the company seems to have a clear title. But even if its claim to an undivided one-half interest in the tracks on the Marginal Street from 14th Street to 22nd Street and on West 22nd Street to Thirteenth Avenue were established, it would have only a nominal value, for the company will get no rental and cannot even use the tracks without making terms with another company. In the discussion of cost-to-reproduce-new and duplication cost, these tracks, in which there is certainly no beneficial interest, will be omitted.

The company has no car barn, power house or real estate of any sort. The only physical property it owns, other than the tracks already mentioned, is unimportant but is included in the appraisals by both engineers.

ORIGINAL COST.

The first factor mentioned in the amendment of 1912 to be considered in determining the fair value of the property is 'original cost of construction.' No cost records were produced, and the evidence throws little light upon the subject. The Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company originally had capital stock of \$500,000 and bonds of \$500,000, but there is nothing to indicate what cash investment was represented by these securities. When the road was sold under judgment of foreclosure in 1896, it was bid in by one Truslow for \$25,000, which consideration is mentioned in the deed transferring the property. The Twenty-eighth and Twenty-ninth Streets Crosstown Company then purchased the property, and the minutes of the Board of Directors state that the consideration was \$8,000 cash for incorporation expenses, \$1,492,000 in capital stock, and \$1,500,000 in first mortgage five per cent gold bonds.

COST TO REPRODUCE NEW.

The second factor mentioned in the law is 'duplication cost.' The evidence introduced by the applicants along this line was the same as that originally submitted in Case 1357, the prior application. The estimate of Witness Floy on the basis of cost to reproduce new as of October 1, 1911, was as follows:—

Tangible Property:—

'Cost of re-production new of physical property now in existence without allowance for property that has disappeared through depreciation or abandonment'.. . . \$405,870

Intangible Property:—

'Expenses preliminary to beginning construction, interest and taxes during construction, Bankers' commission, &c. 304,433

Total.. . . . \$710,303

This estimate includes all of the tracks claimed by the company. It covers tracks which are not used by the company, which cannot be used effectively by the company for physical reasons, and for the use of which the company receives no rental; also tracks that the company cannot use without making arrangements with another company for such use. All are appraised upon the same basis, regardless of the character of the title, the soundness of the claim to ownership or the beneficial character of the ownership. Mr. Floy testified that his estimate did not take into account the original cost of construction, nor the present condition of the property, nor the earning power at reasonable rates, and that he made no allowance for depreciation, although he admitted that 'in determining present value you must consider accruing depreciation.'

The estimate for tangible property contains generous allowances for contractor's profit, engineering, incidentals, etc. Deducting these items, the estimated net cost

of the physical property would be only \$320,901 out of a total of \$710,303—less than 50 per cent. An estimate of over 50 per cent of the entire valuation for overhead charges and intangible items is most unusual to say the least.

An appraisal was also made by Mr. Wilder, an electrical engineer for the Commission. Upon the basis of ownership as established by the preceding facts, his estimate of the cost-to-reproduce-new was:

Property owned and operated.	\$161,724
Property owned but not operated by this company.	12,569
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Total.	\$174,293

These estimates are generous and contain liberal allowances for such items as engineering, administration, contingencies, incidentals, contractors' profits, etc. Comparison with Mr. Floy's estimate shows that Mr. Wilder has been slightly more liberal in his unit prices, but that Mr. Floy has included tracks which the company does not own.

DEPRECIATION AND PRESENT CONDITION.

The amendment of 1912 mentions 'present condition' as a factor to be considered in determining fair value, and of course 'duplication cost' means the cost of duplicating the property as it exists at the time of appraisal and not as it might be if it were new throughout. It is a fact of common knowledge that railroad property wears out and that it depreciates for various reasons, obsolescence and inadequacy being important factors. This phase of the subject has been so thoroughly discussed in opinions in other cases that it need not be considered here.

Metropolitan St. Ry. Co. Reorganization, 3 P. S. C. R. 1st Dist. N. Y., 147-152.
Third Ave. Rd. Co. Reorganization, Case 1181, decided July 29, 1910.

Mr. Floy testified that he did not take into account the present condition of the property and made no allowance for depreciation. His appraisal would be the same whether the property was in fine condition or just ready for the scrap heap. Obviously, such an appraisal is far from conclusive.

Mr. Wilder upon the other hand computed the expired life of the various parts of the road, their probable age, their scrap value, their wearing value and the accrued depreciation up to July 1, 1912—the date of his appraisal. In his opinion, the cost to reproduce the property new-less-depreciation was:—

Property owned and operated.	\$123,610
Property owned but not operated by this company.	9,555
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Total.	\$133,165

INTANGIBLE PROPERTY.

The intangible property transferred from the old company to the new consists of franchises, consents, documents and records. Mr Floy's estimates for 'intangible property' were:—

'Legal, administration and technical expenses prior to and in connection with incorporation and organization, including technical expenses for preliminary work, surveys, expert estimates, etc., minimum allowance (Estimated).	\$50,000
'Legal and administration expenses in procuring consents and certificates of Public Service Commission and other public bodies, condemnation proceedings, arrangements for trackage rights, terminals, etc., minimum allowance (Estimated)	25,000
'Procuring property owners' consents	124,740
'Cost of administration and wages of superintendence during period of construction, not chargeable to or included in estimate of construction, minimum allowance (Estimated)	10,000
'Interest on cost of tangible property during construction, 9 months at 6 per cent.	18,340
'Taxes during construction, one year	7,800
'Working capital (Estimated)	35,000
'Interest on all preceding items	16,253
'Bankers' Commission $2\frac{1}{2}$ per cent.	17,300
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'Total	\$304,433'

These figures are based upon little or no experience; the applicants do not claim that such sums have actually been expended; and no records have been produced to show actual cost. The basic assumption of the witness is that franchises are to be secured under the statutory restrictions that exist to-day and under the present requirements of the Board of Estimate, the Public Service Commission and the courts, and that a large amount of legal and technical work would need to be done before any construction work would be begun. This theory was presented in the Metropolitan Street Railway Company Reorganization Case (No. 1305) and rejected. In discussing this theory the Commission says (3 P. S. C. R. 1st Dist. N. Y., 160-1') :—

'He [the witness in that case] might have gone further and said that, as the city cannot grant a franchise for more than twenty-five years with a renewal period of twenty-five years, and as many of the franchises contain no time limit, the value of these franchises is many millions. He might have said the tendency is towards strict supervision of public service corporations, and the future will bring forth even more stringent requirements. The rights of the present companies will increase in value with every movement for closer supervision of franchise grants. Hence their present value should be still further increased for these reasons. But to authorize securities upon such grounds would clearly be to capitalize every movement for public control.'

When considering these intangible items, it should be recalled that certain general items have already been included in the appraisal, such as engineering, general superintendence and administration during construction. Naturally, nothing already allowed should be added here; but in the estimates presented by the witness, there is a duplication of items (compare items 1, 2 and 4 with allowances under tangible property). Consents and certificates are appraised which the company does not possess (see second item above). Expenses connected with the organization, incorporation and finances of the old company are also included, but the new company will have its own organization expenses, and will not take over the corporate organization of the old company. Therefore, the estimated expenses connected with the establishment of the bankrupt company as a corporation should be omitted entirely or the expenses connected with the establishment of the new corporation should be considered as an offset. Both should not be included.

The cost of procuring property owners consents was computed at \$2.50 *per curb foot* on each side of the street for all of the lines owned, claimed or in dispute. The witness said this unit price was based in part upon the actual cost of procuring consents on Columbus and Lexington Avenues of the Metropolitan system. But the actual average cost in those two avenues was admitted to be \$1 per foot. Upon the basis of \$1 per foot of property abutting on the track, the estimate for the lines owned and operated would be about \$30,000; and for the line owned but not operated \$1,200. These sums are probably too high in view of the cost of work in recent years with which the Commission is familiar.

Concerning 'working capital' estimated at \$35,000, Mr. Floy testified as follows:—

'Q. What is the working capital represented by it at the present time?—

A. The funds being furnished, I suppose, by Mr. Whitridge, for the operation of the road—

'COMMISSIONER EUSTIS: He said he didn't furnish any funds.

'THE WITNESS: Well, his credit.

'Q. How can you capitalize Mr. Whitridge's credit, when he testified here that he wasn't operating the road as the 28th Street Company?—A. Well, you must understand these figures are made up on an assumption of the cost to reproduce the property, and to reproduce the property you have got to have some working capital.

'Q. To reproduce property; that is, to construct it, you have to have working capital?—A. Yes, sir.

'Q. Does working capital have anything to do with the construction of a railroad?—A. If you mean the same thing I do by "working capital," yes, sir.

'Q. What does working capital mean, in your opinion?—A. It means idle funds, in the bank, available to check against.

'Q. During construction?—A. Yes, sir. * * *

'Q. That is, the working capital of the construction company, then?—

A. I never thought of it in exactly that light, no. It may be.'

Upon what theory of law or of common sense, a company may capitalize the credit of another company or an individual is not explained. It is equally absurd to argue that this company should be allowed to capitalize the idle funds or bank balance of a fictitious construction company. The applicants have none except those appearing under the head of current assets, amounting to about \$850 upon June 30, 1912. The new company would have no assets to represent the items of \$35,000, and it must be disallowed in its entirety.

Interest and taxes prior to the supposititious date of operation were computed upon the assumption that the construction period would last eighteen months. Mr. Wilder testified that six months would be ample, and he is undoubtedly right. The taxes would be very small, for the company owns no real estate and the first assessment would probably not be levied until some time after operation had begun in case the road were to be reproduced new. The incorporation tax will be provided for under another heading. (See full discussion of this subject in *Metropolitan Street Railway Company Reorganization*, 3 P. S. C. R., 1st Dist N. Y., 173-5.)

RÉSUMÉ OF DUPLICATION COST.

Upon the basis of cost to reproduce the physical property in a new condition less depreciation and plus preliminary and development expenses, cost of property owners' consents, franchises and permits, interest and taxes during construction, organization expenses of new company, current assets, etc., it is the opinion of the Commission that the fair and reasonable amounts would *not exceed* the following:—

For property owned and operated.. . . .	\$165,000
If property owned but not operated by this company be added to the above.. . . .	180,000

Even upon the basis assumed above, neither of these items represents the property or the equity in the property which the new company would acquire, for it must assume many liabilities which reduce the equity very greatly. But these will not be considered until the earning power of the property has been analyzed.

EARNING POWER.

The amendment of 1912 mentions one other important factor, 'earning power at reasonable rates.' First, as to earnings under the conditions that have actually prevailed.

From the fall of 1896 until October 1, 1908, the property of the old company was operated as part of a large system by the Metropolitan Company or its lessee, the New York City Railway Company, or their receivers, under an agreement dated September 29, 1896, which obligated the operators to pay the principal (\$1,500,000) of the first mortgage five per cent bonds of the Crosstown Company when due, the interest thereon amounting to \$75,000 per annum, and also all taxes; and to maintain the railroad in good condition and repair.

On July 1, 1908, the receivers of the Metropolitan Street Railway alleged that the earnings of the Crosstown road were insufficient to justify them in longer continuing to operate the cars under the aforesaid agreement, and the receivers were thereupon instructed by the United States Circuit Court that at their discretion they might continue to operate the Crosstown Company's lines, but only until October 1, 1908. Upon that date, the road was turned back to the Crosstown Company.

The evidence contains nothing to indicate what the real earnings of the Crosstown lines were from 1896 to 1908, and the action of the judge of the Circuit Court is not conclusive evidence that they did not justify a rental of \$75,000 per annum, but it does confirm the conclusion reached from other data.

From October 1, 1908, to December 18, 1910, the Crosstown Company operated its lines with horse cars charging a five cent fare, but upon the latter date Mr. Whitridge started the operation of storage battery cars and began to exchange free transfers with the Third Avenue system. The receipts and expenses of the Crosstown lines have been computed by the company upon the following basis: The Crosstown Company is credited with all of the fares received on its lines, and the Third Avenue Company keeps all of the fares it receives. The Crosstown Company is debited with the cost of operating its own lines. This arrangement is perhaps more favorable to the Crosstown Company than the circumstances would warrant, for it amounts to a division of the fare equally between the two systems, whereas the passenger could obtain a much longer ride upon the Third Avenue lines than upon the Crosstown lines, and if the proportion going to each company were to be based upon the amount of service rendered, more than half might be claimed for the Third Avenue system. However, the following table summarizes the results of operation for the last three years as reported to the Commission by the operating officials under the Public Service Commissions Law:—

	YEAR ENDING JUNE 30.			
	1909 (a)	1910.	1911.	1912.
	\$ cts.	\$ cts.	\$ cts.	\$ cts.
Total operating revenue.	17,967 96	14,986 05	36,374 60	77,156 25
Total operating expenses.	26,629 96	93,768 75	60,794 82	81,075 74
Operating loss.	8,662 00	78,782 70	24,420 22	3,919 49
Taxes.	188 15	238 33	451 68	5,056 27
Interest deductions (b).	150 00	1,519 22	1,765 23	3,053 38
Track and terminal privileges.		43 08	44 00	44 00
Miscellaneous rent deductions.		3,089 87	2,158 00	....
Net operating loss.	9,000 15	86,673 20	28,839 13	12,073 14

(a) From October 1, 1908, to June 30, 1909—nine months.

(b) Net after deducting interest revenues amounting to \$11.19 for 1910; \$4.77 for 1911.

These figures are incomplete and understate the amount of the deficit in every year except possibly in 1910. Only taxes that are actually paid are charged in the reports; special franchise taxes are omitted. Rental of cars, accident claims and paving claims are material items and yet do not appear in this statement. The amounts set aside for depreciation were inadequate, except possibly in 1910 when there was included in operating expenses the amount of \$65,695.91 for depreciation. If this amount were deducted so that all of the years might be placed more nearly upon the same basis, the deficit for 1910 would be about \$21,000, certain items omitted.

Since December 18, 1910, when storage battery cars were placed upon the lines and when a transfer arrangement with the Third Avenue system was inaugurated, there has been an improvement in the company's business. The following statement shows the traffic and earnings by quarter years from December, 1910, to June, 1912:

Period.	Cash fares (5 cents).	Transfers collected.	Total Operating Revenue.	Total Operating Expenses.	(D = Loss.)	Net Operating Revenue.	Passenger car miles (active).
			\$ cts.	\$ cts.		\$ cts.	
12-18-10 to 3-31-11.....	266,324	84,485	13,316 20	18,353 50	D	5,037 30	90,248
4- 1-11 to 6-30-11.....	334,239	106,012	16,711 95	28,553 85	D	11,841 90	92,260
7- 1-11 to 9-30-11.....	373,385	153,329	18,669 25	21,308 96	D	2,639 71	90,556
10- 1-11 to 12-31-11.....	386,628	165,465	19,331 40	22,037 46	D	2,706 06	90,202
1- 1-12 to 3-31-12.....	360,018	169,360	18,000 90	18,853 00	D	852 10	84,535
4- 1-12 to 6-30-12.....	423,094	195,080	21,154 70	18,876 32	.....	2,278 38	88,807

The figures under the heading 'net operating revenue,' which show a loss except during the last quarter mentioned, are inaccurate, as the deficits would be larger if all taxes properly chargeable had been deducted and if all expenses of the receiver had been entered, including the rental of cars, personal injury claims and paving claims.

The increase in revenues is doubtless due to the effect of the improved service rendered by electric cars as compared with horse cars, or of the interchange of transfers with the Third Avenue roads. That the latter is the principal factor will appear from a consideration of the local and through traffic. Assuming that the transfers given on the Crosstown lines were approximately equal to the transfers collected thereon, it is possible to obtain the number of local riders who did not continue beyond the Crosstown lines by deducting the number of transfers collected from the

number of cash fares paid. On that assumption, the number of local riders would be as follows:

<i>Quarter ending</i>	
March 31, 1911.. . . .	181,839
June 30, 1911.. . . .	228,227
Sept. 30, 1911.. . . .	220,056
Dec. 31, 1911.. . . .	221,163
March 31, 1912.. . . .	190,658
June 30, 1912.. . . .	228,014

These figures indicate that the local traffic has remained stationary and that the increase in revenue has been due to the exchange of transfers. If the road had no transfer arrangements with the longitudinal lines and was entirely dependent on the short distance riders, it would appear that even with the present service, the company could not expect to carry more than one million passengers a year. At five cents each, the receipts would amount to only \$50,000, which would pay for the operation of about one-half the car miles operated during the fiscal year 1912 (384,000 car miles), and would thus give an inferior service which would not retain the patronage assumed above.

The increase in business during the first year's operation of the road in connection with the Third Avenue system was very large, running up in certain months to 100,000 passengers, but in the preceding year, when the company was running a few horse cars at intervals of half an hour, the patronage had fallen off to almost nothing. Since the completion of the first year of storage-battery operation, the increase in traffic has been less significant and has steadily declined from 44,000 in the early part of 1912 to 15,000 in the later months of the year as compared with the corresponding months of 1911. It is not to be expected that the present rate of increase, which exceeds 10 per cent, will continue indefinitely. On the contrary, traffic has probably nearly reached the limit. In 1911 each month brought in larger returns than the preceding month, as well as the corresponding month of the previous year; September, for example, showed 127,000 cash passengers as compared with 104,000 in April. But in 1912 the September figure was 144,225 as compared with 143,907 for April.

The territory now served by the Mid-Crosstown lines has not great traffic possibilities. It is not to be compared with the Thirty-fourth Street or Twenty-third Street lines. The Mid-Crosstown lines formerly got considerable traffic from the ferry terminals at West Twenty-third Street and East Thirty-fourth Street, but that has greatly diminished since the opening of the Pennsylvania Station and the Hudson tubes.

Assuming that the average monthly number of revenue passengers reaches 150,000, which is possible within the next year or two, the annual revenue at five cents per passenger would amount to \$90,000. To carry this traffic, at least as many cars would need to be operated as at present (say 30,000 car miles a month), and the normal cost of operation, including taxes and depreciation, cannot safely be figured at less than 25 cents per car mile. All of the revenue would therefore be required for operation and maintenance, and there would be little if any surplus available for distribution among the owners of the property.

If the revenue passengers for a year should increase to 2,000,000—nearly 500,000, or over 30 per cent, in excess of 1912—the receipts at five cents per passenger would be insufficient to pay all operating expenses, including taxes and depreciation, unless the number of passengers per car mile were increased or the operating expenses reduced to 20 cents per car mile. In order to yield \$10,000 over operating expenses, the number of car miles would have to be reduced below 1912 by nearly 25,000, or the car mile cost cut to 20 cents and the car mileage kept within 20 per cent increase while the traffic increased 30 per cent. Clearly, the prospect for a surplus over operating expenses of any amount is not good.

This case is an illustration of the uncertainty which must arise from an attempt to base capitalization upon earnings, particularly 'earning power at reasonable rates.' In determining what are reasonable rates, one must consider fair value. The Supreme Court of the United States has so decided. If fair value in turn is to be based to any considerable degree upon reasonable rates, it is obvious that one is reasoning in a circle with no sound basis upon which to stand. Furthermore, the earnings of a system do not remain stationary; they fluctuate as conditions change, even though the rates remain stationary. Is the capitalization of a company to fluctuate likewise?

There is one point, however, upon which earnings should have great weight, *i.e.*, the amount of bonds that should be issued. It would be absurd to authorize bonds to be issued in excess of the amount upon which the property will regularly and with reasonable certainty earn interest after paying all operating charges, including reserves for depreciation, etc., and amortization payments. To do so would be to invite foreclosure and reorganization. It is customary for banking houses of standing and repute to go further and insist that interest payments shall not exceed one-half or two-thirds of the net earnings after paying the charges above mentioned.

The above facts and analyses as to the lines owned by the Crosstown Company indicate that:—

(1) *The receipts from horse car operation at a five-cent fare as a separate system would not pay all operating charges.*

(2) *An increase in the rate of fare, even if permitted by law, would be unremunerative and impracticable.*

(3) *The lines may be made to pay expenses if operated in connection with a larger system under an arrangement for free transfers.*

(4) *The power of the property to earn a profit even under such an arrangement is uncertain.*

(5) *There is no evidence to justify the issuance of \$500,000 in bonds and \$500,000 in stock.*

(6) *The bonds alone would exceed the fair value of the property viewed from any standpoint.*

LIABILITIES TO BE ASSUMED.

Whatever may be the original cost of the property, its duplication cost or earning power, the amount of securities which may be issued depends in part upon the liabilities which are to be assumed by the company when it takes over the property. It is patent that if a piece of real estate is worth \$100,000 free and clear of all incumbrances, the purchaser may be justified in paying \$100,000. But if the property is mortgaged or if the purchasing corporation must assume obligations amounting to \$40,000, the net amount it should pay is \$60,000, and it may not capitalize more than \$60,000, which is really the fair value of the property or the equity in the property which it has purchased.

According to the applicants the liabilities to be assumed were as of June 30, 1912:—

1 Taxes.....	\$ 9,639 54
2 Paving claims in suit.....	22,696 01
3 Receiver's certificates.....	29,500 00
4 Interest on Receiver's certificates.....	5,366 25
5 Interest on floating debt.....	2,732 90
6 Accounts payable—	
Bondholders' committee.....	\$15,637 76
Office expense.....	3,000 00
Expense of auditor.....	250 00
3rd Ave. Ry. Co. and associated companies.....	15,053 72
Due for wages.....	740 47
Current operating account.....	1,304 01
Unclaimed wages.....	143 83
	<hr/>
	36,129 79
7 General expenses of bondholders' committee.....	6,731 83
8 Amount paid to referee on taking title to road.....	11,902 40
9 Fees for services of experts.....	4,000 00
10 Fees for receiver.....	10,000 00
11 Fees for attorneys.....	10,000 00
12 Fees for bondholders' committee.....	5,000 00
13 Reserved for Central Trust Co. and their attorneys.....	5,000 00
14 Accident claims not definitely ascertainable.....	5,000 00
	<hr/>
	\$163,698 72

Items (1) to (5) inclusive represent obligations that must be paid, and only one may be reduced—(2). Item (6) represents property purchased or expenses growing out of operation. Items (7), (9) and (10), and part of (8), (11), (12) and (13) are connected with the receivership period and the sale of the property. Certain others are part of organization expenses. In view of the complexity of the situation and the difficulty of separating these items, it would be simpler to allow for organization expenses upon the asset side and consider all liabilities as charges against these assets. Certain of the items may be reduced, but there is nothing to indicate that the total will fall below \$150,000.

The company has no money with which to pay off these obligations, and evidently will have little in the immediate future. Either the creditors must wait or submit to a reduction of their claims, or all must be capitalized. Whatever may happen, the liability side of the account will not be less than \$150,000 as of June 30, 1912. Assuming for the sake of illustration that the Commission were to find that the fair value of the entire property free and clear from all debts were \$170,000, disregarding earning power which *must* be considered under the amendment of 1912, the Mid-Crosstown Company could not issue securities in excess of \$170,000. But obligations do exist to the extent of \$150,000 at least, and the net amount, therefore, which may be represented by capital could not exceed \$10,000 or \$20,000 upon the assumption just made.

REORGANIZATION UNNECESSARY.

It is not necessary, however, that any securities be issued, for it is the avowed intention of the applicants to sell the property, or whatever rights they may have in the property, to the Third Avenue Railway Company. Upon this point the following excerpt from the testimony is of interest:

‘MR. GILBERT: A. * * * We want, and we don't care what kind or how much securities we issue, so long as we satisfy the Third Avenue and get the money for our bondholders. What we want to do is to sell our road. You remember, I talked that over with you last summer.

‘COMMISSIONER MALTBIE: If you want to sell your road, why don't you sell your road?

‘MR. GILBERT: They insist upon our reorganizing the road and issuing securities of certain character, and taking our road over in that way. That is the petition that will come directly before you, and they will have to fight that out with you.

‘Now, so far as we are concerned, if we get down to the point—if we can take the position that we can issue any amount of securities we like—which,

I think, will be a rather useless thing—after all, what we want to do is to issue bonds that will be of use to us and that will accomplish the purpose we have in view, and at the same time protect the public, and it will get down very largely to what the Commission will be satisfied ought to be done in turning the road over to the Third Avenue.’

From the standpoint of the Mid-Crosstown Company or the Bondholders’ Committee which purchased the property, it would be much simpler and less expensive to transfer the property directly to the Third Avenue Company; and from the point of view of the Third Avenue Company, there is apparently no legitimate reason why it should not purchase the property outright. If the Mid-Crosstown Company should issue certain securities and the Third Avenue Company should buy them, the latter would get no more than it would if it purchased the property itself. When a person desires to buy property, he buys the property, and does not form a corporation to acquire it, to issue securities and then sell the securities to himself, unless there is some unusual result to be achieved by such manipulation. Dummy corporations have never been viewed with favor by the Commission, and their existence is usually detrimental to public welfare.

Regarding inter-corporate holdings, the Report of the Railroad Securities Commission, of which President Hadley was Chairman, says:—

‘Where a railroad controls the operations of another railroad by owning a majority of its stock, or where a holding company controls the operations of several roads in the same manner, we have all the disadvantages of consolidation, without getting all of its advantages. We get the centralization of financial power; we do not get all the economy of operation which should go with it.

‘Apart from this general danger, we open the way to several specific evils. * * *

‘Again, the existence of two or more companies under the same management, having separate organizations but united control, invites the concealment of financial transactions by the shifting of charges from one company to another. We have already shown how this may happen in the construction of a new road. It is equally possible in the operation of an old one.

‘A further effect of intercorporate holdings is to change contingent charges into fixed ones. A railroad company buying the stock of another company almost always issues collateral trust or other bonds to pay for it; in other words, it puts the stocks into its own treasury and sells the bonds to the public. As long as the road is prosperous this change does little harm. In fact it may appear to do good. When a company has been able to buy a five per cent stock by the issue of its own four and a half per cent bonds, there is an apparent profit of one-half per cent annually on the transaction to the company and an apparent reduction in total charges which it must meet. But with any diminution in traffic, the bad effect of the change is at once obvious. The interest on the bonds remains a fixed charge against the company. The effect of a loss of dividends would have been felt chiefly by the individual stockholders; a default, or even a threatened default, of interest has an effect on the credit and confidence of the country as a whole, and may precipitate a financial crisis.’

The proper method of procedure is a sale of the property in question to the Third Avenue Company if it really desires to buy it. According to the petition in Case No. 1521, Mr. Whitridge, on behalf of the Third Avenue Company, offered to pay 30 per cent of \$1,373,000, par value of first mortgage bonds deposited with the Committee, or \$411,900, for which he was to receive stocks and bonds of the Mid-Crosstown Company having a par value of \$1,000,000. Mr. Whitridge also agreed to assume obligations amounting to approximately \$164,000, which would make

the property of the Mid-Crosstown Company cost him \$576,000. The present case does not involve the reasonableness of such a purchase price and the order issued in the pending proceedings does not determine action upon the application in Case No. 1521. What the Third Avenue should be allowed to capitalize in case it purchases the property of the Mid-Crosstown Company is a matter to be considered and decided when the Third Avenue Company makes the proper application.

In the matter of the Petition of ERIE RAILROAD COMPANY for authority to issue its interest bearing warrants evidencing the right of its stockholders to dividends on its first and second preferred stock.

The Board of Directors of Erie Railroad Company on the 28th day of August, 1907, declared a dividend of 2 per cent upon its first preferred stock, payable October 1, 1917, and a dividend of 4 per cent upon its second preferred stock, payable November 1, 1917. It further determined to issue interest bearing dividend warrants evidencing the right of the stockholders to the dividends so declared, subject to the approval of the Public Service Commission. On an application for the approval of the Commission to the issue of such dividend warrants, HELD:

That in order to authorize the issue of stock, bonds or other evidence of indebtedness pursuant to section 55 of the Public Service Commissions Law three elements are essential .

1. That capital is to be secured by the issue.
2. That the use of such capital must be necessary for one or more of the four purposes specified in the section.
3. That the amount authorized is reasonably required for such purpose or purposes.

HELD further:

1. That dividends must, in obedience to section 23 of the Stock Corporation Law, be declared only from surplus profits.
2. That surplus profits belong to the corporation and not to the stockholders until a dividend is declared.
3. That by the declaration of a dividend payable at a future time no capital is secured to a corporation proposing to issue warrants evidencing such dividend.
4. That an issue of such dividend warrants is not necessary for any of the four purposes specified in section 55.

The Commission denied the application for the foregoing reasons and held that no evidence of indebtedness payable more than twelve months after the date thereof can be issued by a railroad corporation except for one or more of the purposes specified in section 55.

Submitted October 5, 1907. Decided February 27, 1908.

In the matter of the application of THE ROCHESTER CORNING ELMIRA TRACTION COMPANY for Consent to the execution of a First Mortgage for \$8,000,000 and for an Order authorizing the issuing of Bonds to the amount of \$8,000,000 to be secured by Said Mortgage, and Authorizing the Issuing of Capital Stock to the Amount of \$3,880,000.

The Rochester Corning Elmira Traction Company was on the 22nd day of March, 1907, granted a certificate of public convenience and a necessity by the former Board of Railroad Commissioners to construct its proposed road from Rochester to Elmira, the line passing through Dansville. Prior to any actual construction of any part of its proposed road and on the 8th day of April, 1907, the Company, pursuant to the provisions of section 90 of the Railroad Law, executed a statement that it proposed to construct an extension and branch of its road from Dansville to Hornell, and that statement was filed in the offices in which its certificate of incorporation is filed. The local consents required by section 91 of the Railroad Law and the consents of the local authorities having control of the streets and highways in which it is proposed to build and operate such extension have never been obtained.

On an application by said company under section 55 of the Public Service Commissions Law for authority to issue stock and bonds for the construction of the entire road including the extension from Dansville to Hornell, capitalization for the construction of such extension was denied.

HELD, 1. That the conditions imposed by sections 90 and 91 of the Railroad Law upon a street surface railroad corporation seeking to construct an extension or branch of its road are conditions precedent all of which must be complied with before the corporation becomes entitled to begin the construction of such extension.

2. That the consents of the local owners and authorities not having been obtained prior to July 1, 1907, the corporation was not on that day entitled to begin the construction of said extension and hence was not within the exception contained in section 53 of the Public Service Commissions Law.

3. That although the line from Dansville to Hornell is located at substantially right angles to the main line it is an extension within the meaning of that term as used in said section 53.

4. That the company must procure the permission and approval of the Commission before beginning the construction of such extension. Upon application for capitalization of a newly organized railroad company the proceeds of such capitalization to be used for constructing and putting in operation its railroad.

5. Proof will be required showing in careful detail the probable cost of the physical construction and equipment of the road.

6. In addition to estimates of the physical cost proof should be given touching the following matters which enter into the expense of launching the enterprise: (a) expense of organization; (b) incorporation tax; (c) expense of obtaining certificate of public convenience and a necessity; (d) preliminary engineering expenses; (e) expense of proceedings to procure authorization of issue of stock and bonds; (f) expense of marketing securities; (g) discount upon bonds provided they cannot be sold at par; (h) interest upon the bond issue during the period of construction and prior to the beginning of revenue producing operations; (i) compensation of officers during the construction period; (j) incidental expenses during construction period; (k) expense of obtaining local franchises and consents.

7. An allowance will be made for a proper amount of working capital to be determined by the extent of the proper operations.

8. A fair allowance will be made for services in promoting the organization of the enterprise. Such allowance will be placed upon the basis of just payments for valuable and indispensable services.

The division of the capitalization between stock and bonds will be determined in substantially the following manner whenever the same is practicable:

9. An estimate will be made from consideration of the results of operation of existing roads of the probable gross earnings.

10. An estimate will be made in like manner of the probable operating expenses, taxes and depreciation charges.

11. The excess of earnings over the disbursements which must be made before fixed charges can be met represents the sum, which is applicable to fixed charges.

12. The maximum bond issue, which will be allowed must be determined by the sum thus ascertained to be applicable to the payment of the interest charge.

13. No bond issue should be permitted creating an interest charge beyond an amount which is reasonably certain can be met from the net earnings.

14. Stock representing a cash investment should be required to an amount sufficient to afford a moral guaranty that in the judgment of those investing the enterprise is likely to prove commercially successful.

The order authorizing such stock and bond issues will contain appropriate provisions designed to secure the construction of the road in accordance with the plans and specifications upon which the authorization was made and not in excess of the actual requirements.

If the allowance proves inadequate for the required purposes an application for further capitalization may be made upon which application the expenditure of the proceeds of stock and bonds already authorized must be shown in detail.

Submitted September 10, 1907. Decided March 30, 1908.

In the Matter of the Application of THE DELEWARE AND HUDSON COMPANY, under subdivision 10 of section 4 of the Railroad Law, for consent to the execution of a first and refunding mortgage upon its property, rights and franchises covering \$50,000,000 coupon or registered gold bonds, maturing May 1, 1943; and for authority under section 55 of the Public Service Commissions Law, to issue bonds under said mortgage to the amount of \$26,500,000.

1. Applications of public service corporations for authority to issue stock, bonds or other evidences of indebtedness involve determination by the Commission whether the capital to be secured by any such issue is reasonably required for the purposes of the corporation enumerated in the statute and in arriving at such determination the Commission must carefully scrutinize the proposed issue and use such time as may be necessary for examination, consideration and decision, notwithstanding opportunities may exist for the applicant to take advantage of favorable market or investment conditions.

2. The privilege preserved to public service corporations under sections 55 and 69 of the statute to issue notes for proper and lawful purposes payable at periods of not more than twelve months, without first obtaining authority therefor from the Commission, was not designed to operate as a license whereby, through successive renewals with extensive additions of new short time note issues, a great mass of obligations running over a series of years is piled up to become eventually the subject of application for leave to fund by mortgage and an issue of long time bonds. Such privilege was intended to enable the corporation to contract temporary loans which it is purposed at the time of issue to discharge at maturity. When the exercise of such privilege is developed into a practice covering several times of maturity and renewal or partial renewal extending through a period of several years, the intent of the law is being evaded and the corporation is accomplishing by indirection what the law forbids shall be done directly, namely, the issuance of evidences of indebtedness carried

without actual payment throughout a period of more than twelve months without first obtaining the approval of the Commission.

3. Where a practice of issuing notes with repeated renewals and additions and partial payments shows that the application of the money derived from the note issues dates back so far in the past and becomes so intermingled with expenditures from income or surplus funds that it is impracticable to determine whether the money derived from notes has been expended for value and for purposes sanctioned in the law, or where such practice renders the applicant unable to show with certainty to what purposes the note proceeds have been actually devoted or what has been the actual cost of construction, improvements or additions involved, including the unit prices paid for construction and improvements as distinguished from maintenance, the Commission cannot in such cases say that a proposed bond issue is reasonably required for proper purposes of the corporation, and the application must be denied.

4. When short time loans are soon to mature and an extension is deemed necessary by the corporation, the proper course for the corporation is to then make application for leave to issue a note or notes covering the maturing issue to run for more than one year, or to issue stock or bonds to obtain the means of payment, and upon such an application, the proper account of the disbursements having been kept, the purposes for which the proceeds of the maturing note obligation were used can be readily ascertained, and the proof as to the return made to the company in the expenditure of such proceeds can be easily produced.

5. The same test must be applied in cases where it is sought to issue bonds to refund or discharge existing note obligations that is employed upon applications to issue bonds to acquire property, construct additional line or make improvements generally, and that test is whether the particular matter is a proper subject of capitalization.

6. Where property is sought to be acquired by means of a bond issue, or notes covering the acquisition of property are sought to be refunded by a bond issue, determination of the question whether the capital to be secured by such an issue is 'reasonably required' involves inquiry as to the character and use of the property with reference to the general business and public duties of the applying corporation, and in all such cases the Commission must distinguish between what are merely investments in disconnected properties and what are acquisitions of property having some definite useful relation to the public service operations of the corporation.

7. Advances of money made by the applicant to companies holding the nominal title to roads lying in Canada which are to all intents and purposes important extensions of the applicant's line, and which advances were used for the purpose of constructing the Canadian roads and in return for which the applicant received certificates of indebtedness of one of the Canadian companies, it being the purpose to merge both of the Canadian companies when construction is completed, are held to constitute in effect the purchase price of the certificates of indebtedness of the Canadian company, that the purchase of such certificates of indebtedness was the acquisition of property, a purpose for which the statute provides that capital may be secured, and that under the circumstances of this case, which include the full ownership by the applicant of the stock of both Canadian companies, a bond issue covering note issues used to purchase the debt certificates should be approved.

8. A first and refunding mortgage covering the applicant's owned and leased railway properties and trackage rights over various lines for an amount limited to \$50,000,000 to become due in 1943 is approved, subject to prescribed limitation of bond issues.

9. Applicant authorized to issue under such mortgage bonds to the amount of \$6,500,000 bearing not to exceed four per cent interest, for the sole purpose of retiring outstanding bonds under three existing mortgages, the terms and conditions for exchange of the new bonds for underlying bonds, or for the sale of any of the new bonds in order to purchase any of the underlying bonds, to be first submitted to the Commission for approval, provided that such exchange may be made par for par with-

out payment of any premium on the old bonds by the applicant from its treasury, at any time without such approval.

10. An issue of bonds under such mortgage to the amount of \$13,309,000 covering certain existing note obligations of the applicant aggregating \$12,644,080.22, and an allowance of not more than five per cent of the par value of such bonds for the purposes of sale, is approved.

11. Certain note obligations of the company covering the acquisition of securities of two electric railway companies, the United Traction Company and the Troy & New England Railway Company and advances made to the Hudson Coal Company, the applicant's subsidiary coal corporation, not supported by proof necessary to enable the Commission to say that the expenditures from the proceeds of the notes were for such purposes as justify a holding that the capital now sought to be secured to refund such note obligations is reasonably required; and without expressing any present opinion in relation to the proposed capitalization covering such acquisitions of property, it is held that they are matters which may be presented by the applicant in an application for further hearing.

Submitted June 22, 1908. Decided July 7, 1908.

In the Matter of the Application of ERIE RAILROAD COMPANY, under section 55 of the Public Service Commissions Law, for authority to issue its 5 per cent collateral gold bonds to the amount of \$30,000,000.

1. The provisions of the law regulating capitalization of public service corporations are general in terms, and are designed to embrace cases of all classes, those presenting difficult conditions and pressing necessity as well as those relating simply to the refunding of prior liens or the raising of capital for the acquisition of property or for improvements by the sale of bonds which are marketable at or near par value. Upon all cases of capitalization the law intends that the Commission shall act with comprehensive knowledge of financial, physical, operating and traffic conditions pertaining to the property sought to be charged with new capital, and that permission to raise the new capital shall be granted in those cases where the kind of bonds, the security upon which they are based, the terms of proposed sale or exchange, the stated disposition of proceeds, the financial condition of the applicant, its resources, traffic and otherwise, and generally, the state of its property, are such as, in the belief of the Commission, warrant certification that the capital sought to be secured by the proposed bond issue is reasonably required specifically for one or more of the purposes named in the statute as the basis of future capitalization.

2. A bond issue by a corporation subject to the Public Service Commissions Law to fund a stated amount of interest is not excluded by the statute, and it is for the Commission to determine in such a case, as in every case of capitalization sought, whether the capital to be secured by the proposed issue is 'reasonably required' under all circumstances, including those pertaining to the issue itself, and in view of appropriate conditions which may be specified in the authorizing order.

3. When an applicant corporation proposes a bond issue involving a distinct plan of procedure, including the funding of interest coupons of named existing bond issues for a period of years, with a condition attached that an amount shall be taken semi-annually from income equal to the interest accruing in each semi-annual period and expended for specified necessary improvements to its property, and such funding is shown by the applicant itself to be an essential element without which the success of the plan is problematical, the Commission in approving the plan as a basis of authorizing the bond issue cannot properly disregard such essential element of fund-

ing and expending an equal amount from income for improvements, but should insist that such funding and expenditure of income and all other features of the financial scheme underlying the proposed issue shall be carried out.

4. Ordinarily, in cases of capitalization it is improper that authority for a bond issue and authority for future issuance of notes should be permitted to run concurrently for the same general purposes during a considerable or indefinite period, when the one issue is intended to be used to refund the other.

5. The probable resources of the Erie Railroad Company stated and discussed at length in connection with its proposed execution of a collateral trust indenture and issue thereunder of \$30,000,000 five per cent bonds, maturing in not to exceed thirty nor less than twenty years with which to effect an exchange for \$11,380,000 of interest on its general lien and convertible bonds accruing during five years ensuing and \$10,500,000 of three years' notes issued under authority granted in 1908 for an issue of such notes to the amount of \$15,000,000, and also the remainder of the amount of notes so authorized which may be issued, the bonds proposed and the said notes outstanding not to exceed at any time an aggregate of \$30,000,000, excluding such notes so exchanged as may be deposited as security for the proposed issue of bonds, and the remainder of the bonds not so exchanged to be sold at not less than 87½ per cent of par value net to the applicant and used for specified improvements of the applicant's property. The said statement as to the proposed bond issue also includes the expenditure from income for such improvements during each semi-annual period when the said coupons secured by exchange of the proposed bonds would accrue an amount equal to such accrued interest, thereby causing the funding of such interest coupons to cease one-fifth during each of five years and become at the end of each year and altogether at the ending of the five years a bond issue for improvements increasing the value and probable earning power of the property. Upon all facts and conditions disclosed by the investigation required upon this application.

HELD, That the capital sought to be secured by the applicant under the proposed bond issue and plan of procedure thereunder is reasonably required for lawful corporate purposes enumerated in the statute, namely, the refunding of the stated obligations and making specified and needful improvements to property embraced in its railroad system, and that authority to issue the proposed bonds according to the plan stated herein should be granted, subject to conditions generally described as follows:

(a) Consents to the funding of general lien and convertible bond coupons accruing during the five years by exchange thereof for the proposed bonds should be secured to the extent of 90 per cent of such coupons (or such less percentage as the Commission may hereafter designate upon satisfactory showing by the applicant) prior to October 1, 1909, (or such later date as may be fixed hereafter by the Commission), none of the remaining portion of the bonds to be used for any other purpose until such exchange shall have been accomplished; and in case consents for the exchange shall not have been secured to the extent and within the time fixed by the Commission the application should then stand as if denied, with authority to the applicant to present a revised or new application in accordance with the then existing situation.

(b) The unissued notes heretofore authorized by the Commission may be issued and sold prior to October 1, 1909, but not after that date.

(c) The collateral indenture should be prepared and submitted for approval by the Commission and should contain such suitable covenants and defeasance clauses as will render effective the restrictions provided in such order.

(d) Such indenture should provide for the expenditure of money from income for specified improvements during each semi-annual period when the funded interest will accrue, or within three months thereafter, equal in amount to such interest accruing in that period, carrying any excess of money so expended over to the credit of succeeding periods. The like requirement should be specified as to the use of pro-

ceeds of any of the notes hereafter issued for funding any interest obligations. The order should provide that improvements other than those specified in this record may be made with such income upon special order of the Commission, and it should also provide that in case of failure to so expend money for improvements during any calendar year, the sum not so expended shall be expended for such purpose during a period not less than three months to be fixed by the Commission.

(e) The exchange of the proposed bonds for coupons and notes should be on the basis of face value, without premium or commission, but indispensable expenses involved in securing consents for such exchange should be permitted.

(f) The company should file its acceptance of the order within thirty days.

Submitted January 5, 1909. Decided March 2, 1909.

In the Matter of the Application of BINGHAMPTON LIGHT, HEAT AND POWER COMPANY for authorization to issue preferred stock to the amount of \$50,000, bonds to the amount of \$680,000, and for other authorization.

Application for authorization to execute a general extension and refunding mortgage upon all the property of the applicant to secure an issue of 5 per cent forty-year gold bonds to the amount of \$1,000,000; for authorization to issue presently bonds upon the security of said mortgage to the amount of \$500,000 for the purpose of refunding a like amount of underlying bonds; to the amount of \$180,000 to discharge (a) outstanding notes of the company to the amount of \$158,000, (b) 'floating indebtedness contracted for the purposes set forth in the foregoing petition' (but not particularly specified); and to issue preferred 6 per cent cumulative stock to the amount of \$50,000, the proceeds to be used for the same purposes as those of the bonds to the said amount of \$180,000.

Examination of the company's affairs disclosed that it commenced business in March, 1902, with a physical plant which was charged to Fixed Capital in an amount not precisely ascertained but which it is just to assume was approximately \$500,000. Since that date the company has practically rebuilt its physical properties, the valuation placed by the Commission's engineer upon the part remaining being only \$51,000. The company has credited nothing to Fixed Capital on account of the property thus displaced and destroyed except the sum of \$15,616.88, the amount realized by it for junk from such displaced plant. The remainder of the original charge to Fixed Capital on account of such displaced plant it still carries upon its books as an asset. It further appeared from an analysis of the company's accounts that the avails of the outstanding notes for \$158,000 which it is sought to refund by the issue of stock and bonds were necessarily used in whole or greater part in making replacement of the plant destroyed. The value of the replacements has also been charged to fixed Capital, so that both the destroyed plant and the replacement thereof appear in the company's balance sheet as assets.

HELD: 1. The greater portion of the fixed capital of a public service corporation is inevitably worn out or destroyed in performing the service required of it. Ordinary repairs merely delay but cannot prevent the inevitable hour when such capital will be dissipated. This depreciation and final extinction of capital must be borne by the consumer because it is essentially a part of the cost of production of the article or service for which he must pay. Unless the consumer pays the entire cost of production, it is impossible for production to continue permanently.

2. That the practice of the applicant in replacing its worn out plant with moneys derived from new issues of stock and bonds, retaining in its Fixed Capital account

as an asset the cost of the destroyed plant, and also charging to such account the cost of the new plant replacing the old one inevitably leads to such disastrous results that it cannot receive the approval of the Commission.

3. The principle enunciated in the case of the application of Niagara Light, Heat and Power Company; namely, that the Commission will not ordinarily, in the exercise of that range of judgment which it possesses in matters of capitalization, permit an issue of stock or bonds for the purpose of making replacements of fixed capital without a proper readjustment of the accounts of the corporation, reaffirmed.

4. That the same principle applies to the case of an application to issue stock or bonds for the purpose of discharging or refunding an obligation incurred in making replacements.

5. It does not hold that it will not authorize the issue of stock or bonds for the purpose of making replacements. If such authorization is desired, the company must either credit to Fixed Capital the sum with which it stands charged on account of the displaced property or make such other adjustment of its accounts as will make a true showing of the affairs of the company.

Upon the part of the case relating to refunding notes for \$158,000 application denied, but proceeding continued to enable the applicant, if it shall so desire, to give proof as to how much of said indebtedness was incurred for additions and betterments and as to the amount expended for replacements, and to make proper adjustment of its accounts in accordance with the principles laid down in the opinion.

A part of the application was for authorization to issue stock and bonds to pay certain alleged indebtedness of the applicant. The proof disclosed that such alleged indebtedness was not owing to third parties but was in fact moneys which applicant had expended for its own purposes. In short, it desired to accomplish what is termed a reimbursement of its treasury. Upon this part of the application, the principle stated in the application of the Lehigh and Hudson River Railway Company, decided May 7, 1908, reaffirmed, and authorization to issue stock and bonds for such purpose denied.

Case continued for further consideration along lines suggested in the opinion.

Decided August 4, 1909.

APPENDIX L.

62d Congress, 3d Session, Senate of the United States, Report No. 1290.

VALUATION OF THE SEVERAL CLASSES OF PROPERTY OF COMMON CARRIERS.

February 20, 1913.—Ordered to be printed.

Mr. LA FOLLETTE, from the Committee on Interstate Commerce, submitted the following report.

[To accompany H. R. 2593.]

The Committee on Interstate Commerce, to which was referred the bill (H. R. 22593) to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof by providing for physical valuation of the property of carriers subject thereto and securing information concerning their stocks and bonds and boards of directors, having had the same under consideration, reports it back with amendments, with the recommendation that it do pass as amended.

Your committee recommends striking out the first five paragraphs of the House bill, which in some respects are indefinite and uncertain and deal with some matters not properly within the scope of a bill designed to provide for a valuation of the several classes of property of carriers subject to the act to regulate commerce. In lieu thereof the committee proposes certain amendments which it believes essential to enable the commission to secure every element of the value of the property of the common carriers, so classified and analyzed as to enable the commission and the courts to determine the fair value of such property for rate-making purposes.

The courts from the first have used various terms descriptive of the values and elements of value to be determined as a basis for ascertaining the fair value of railway property. Some of these terms they have altogether rejected. Others have come to have an accepted meaning and significance by commissions and courts and are recognized as covering all the elements of value attaching to the property of common carriers for rate-making purposes. When these values are once ascertained, each aids in correcting the other, and is given such weight as it is entitled to in enabling the commission and the court to arrive at the fair value of the property of the carrier used for its purposes as a common carrier. These terms accepted by recognized authority are: (1) The original cost to date; (2) cost of production new; (3) cost of reproduction less depreciation; (4) other values and elements of value—that is, intangible values.

As amended by the Senate committee, the bill provides in the first subdivision of section 19a for ascertaining these values.

(1) THE ORIGINAL COST TO DATE.

Existing railroads have actually been built up through a series of years. The construction has been piecemeal and has advanced with the growth of the business. The

original cost to date will, at every stage of construction, take account of the prices paid at the time for property, material, and labor; the amount of money paid out for legal services, engineers, architects, designers, management in organizing the corporation, and constructing the road. It will show the exact amount received from the sale of stocks and bonds, and if the bonds have been sold at a discount, the price realized, and all the expenses of brokerage. It will show the amount paid in by stockholders. If stocks or bonds have been issued for property instead of cash, the value of the acquired property will be ascertained. If the present corporation has acquired the property, or any portion thereof, at less than its physical value, or through some form of manipulation or combination or deception to the public, with a view of strengthening its monopoly character, and increasing its prospect for excessive value, or if its expenditures do not represent reasonable expenditures which ordinary business management would not have approved, all of these facts will be disclosed by ascertaining the original cost to date. And it will be for the commission and the courts to determine to what extent such investment will be allowed to be capitalized as against the public for rate making purposes. In short, the original cost to date will show the true investment.

As to the importance of obtaining the original cost to date, Mr. Henry L. Gray, engineer of the public service commission of the State of Washington, says:

This work (the ascertainment of the original cost to date) was of the maximum value, as it acquainted the engineers not only with the cost of the lines as a whole, but also with the cost of many isolated structures, such as bridges, buildings, &c. It also informed them as to the overhead cost, such as engineering, legal, and general expenses, and other kindred items. With this knowledge it was a comparatively easy matter to reduce the cost of the different classes of property to a unit basis, such as the cost of bridges per linear foot, the cost of buildings per square foot of floor area. Being in possession of the detailed cost of all the modern structures, a most desirable guide was available in fixing the cost of reproduction. Without the knowledge of these costs as obtained it would have been utterly impossible to intelligently dispute the estimates later prepared by the railroads.

Clyde B. Aitchison, chairman of the Oregon commission, says:

Any rule based on reproduction value less depreciation which ignores the item of original cost, additions and betterments, is not only economically and legally unsound, but is fraught with possibilities of greatest danger to the country.

Commissioner Maltbie, of the New York Public Service Commission, says:

I think altogether too much attention has been given to cost of reproduction and too little to investment (original cost to date). Where we can obtain the actual facts regarding the cost of the existing plant we put much more emphasis upon these figures than upon estimates of engineers.

Prof. John R. Commons, of the University of Wisconsin, and at the present time a member of the Wisconsin Industrial Commission, speaking before the committee of the importance of ascertaining these three items of cost: (1) Original cost to date, (2) cost of reproduction new, and (3) cost of reproduction less depreciation, says:

The court or commission must necessarily have these three items. It must have this engineering cost of reproduction; it must have the cost of the property less depreciation; and it must have its historical cost (original cost to date) in order to get a true, fair, or reasonable value. It may be that none

of these three is reasonable, and it must check and compare in order to see where it is coming out. It could not properly make a mere arithmetical compromise or average between them, but it should work it out on principle. *

* * In the original cost everything that is involved in the question of cost to the present owner is included and cannot be avoided. It is included, however, under this condition which the court carries through all of its reasoning on these questions, that that price or cost must have been reasonable. But if there has been fraud or misrepresentation or monopoly unwarranted and unjust and unfair to the public, that must also be considered. If, on the other hand, the company has been in severe straits, has not been earning dividends and therefore the purchase was a sacrifice sale or price or cost, that must be given due weight. In the treatment of those questions which have been more or less touched upon by the courts, the idea is to find what, under normal and reasonable conditions, would have been paid at that time. And I think that is the reason for using the term 'original cost' instead of 'actual cost' for the real thing that is meant to be determined is the actual cost at the time of acquisition. But actual cost may be very different from reasonable cost. It may have to be an estimated cost if the books are lacking that is the probable cost at that time. Consequently the term 'original' I think, has come to be pretty well recognized by commissions, by engineers and accountants, as well as those cases which come up to the courts as a basis upon which to ascertain the actual cost. The term 'original' is equivalent to 'actual' as against the speculative or hypothetical.

Prof. Edward W. Bemis, late of the Chicago University, and public utility expert who has had the widest practical experience in valuing public utilities, regarding the importance of obtaining the original cost to date, said:

That (the original cost to date) is recognized in the courts as one element to be considered. The Wisconsin commission recognizes it as important in its investigation of railroads as well as municipal utilities. The gas and electric light commission has recognized it in Massachusetts since its creation, and courts are recognizing it everywhere.

(2) COST OF REPRODUCTION NEW.

This will show the exact cost of reconstructing the property in all its parts at existing prices. While this may be regarded as a classification of diminishing value, it is contended that it is entitled to consideration in ascertaining the value of the physical properties of the carrier, and that contention is recognized by some commissions and some courts. It is therefore included as a separate classification.

(3) THE COST OF REPRODUCTION LESS DEPRECIATION.

This will show the exact cost of reproduction in existing condition. This cost is arrived at by taking the amount of depreciation which has occurred in every part of the property since it was laid down or employed in the public service. This is an element of value so generally considered essential by commissions and courts that the wisdom of ascertaining it will not be questioned.

(4) OTHER VALUES AND ELEMENTS OF VALUE—THAT IS, INTANGIBLE VALUES.

This classification provides for going value, good-will value, and franchise value. Whether any or all of these values will be considered by the commission or the courts in determining the fair value of the property, and, if so, what importance shall attach to them, is a matter for the commission and the courts. Especially as to intangible

values, the commissions and the courts are in a transition period. The elements of value which will finally constitute fair value for rate-making purposes are steadily narrowing. They are not expanding. No decision by commission or court will stand which is ultimately found to be unfair to the public or to the common carrier. The committee has, it is believed, provided for ascertaining every element of value which, upon recognized authority, should be considered.

The third subdivision of section 19a requires the commission to ascertain and report separately the property held by railroads for purposes other than those of a common carrier. This subdivision, and likewise the fifth subdivision, will furnish information which, in some aspects, will be useful to the commission and to which from every point of view, the public is rightfully entitled.

The fourth subdivision of section 19a relates to the financial history of the common carrier and covers all transactions material to the ultimate purpose for which this bill is enacted.

The amendments in the succeeding paragraphs of the bill relating to procedure are designed to make the original purposes of these paragraphs more definite and certain of administration. Under the terms of the House bill, whenever the commission completes the valuation of the property of any common carrier, it is required to give notice and grant a hearing thereon to such carrier, with a view of making any necessary corrections before such valuation becomes final. The Senate committee amendment designates such completed valuation as 'tentative' for the time being and provides that notice shall be given not only to the common carriers but also to the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe, stating the valuation placed upon the several classes of the property of said common carrier and providing that any or all parties notified who protest shall be heard before such tentative valuation shall become final. The Senate amendment further provides that such final valuation shall be *prima facie* evidence in all judicial proceedings for the enforcement of the original interstate-commerce act, and all amendments thereto, and in any judicial proceeding brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

The Senate committee recommends the further amendment, that, if upon the trial of any action involving the final value fixed by the commission, evidence should be introduced regarding such valuation which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment shall transmit a copy of such evidence to the commission, and stay further proceedings in such action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same, and may fix a final value different from the final value fixed in the first instance, and may alter, modify, amend, or rescind any order which it has made involving said final value, and shall report its action thereon within the time fixed by the court. If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of, and the court shall then proceed to render judgment thereon, as though made by the commission in the first instance. If the original order of the commission shall not be rescinded or changed by it, the court shall render judgment upon such original order.

Up to 1906 the commission had sustained 32 reversals in the Supreme Court. In 26 of those cases the record discloses that the orders of the commission were reversed, because testimony was offered upon the trial before the court which was not offered when the case was presented to the commission.

The purpose of this amendment is to give the commission the benefit of any testimony which may be offered as to the valuation, which was not presented to the commission on its hearing of the proceeding. If the commission finds the new testi-

mony material and important, it is afforded opportunity to modify its order in the proceeding. Such modification of the order may lead to withdrawal of the appeal or to confirmation of the order by the court. In any event, it is fair to the commission and to the public, imposes no hardship upon the parties, and may work a great saving of time and expense incident to reversal and retrial.

Tuesday, February 11, 1913.

COMMITTEE ON INTERSTATE COMMERCE,
UNITED STATES SENATE, WASHINGTON, D.C.

The committee met at 10 o'clock a. m. for the purpose of considering the bill H. R. 22593, Sixty-second Congress, third session, under the following resolution:

IN THE SENATE OF THE UNITED STATES,

February 5, 1913.

Whereas the Senate Committee on Interstate Commerce is considering H. R. 22593, 'An act to amend an act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, by providing for physical valuation of the property of carriers subject thereto and securing information concerning their stocks and bonds and boards of directors': Therefore

Be it resolved, That said Interstate Commerce Committee of the Senate is hereby authorized and directed to inquire into the matters embraced in said H. R. 22593 at the earliest practicable date and for that purpose they are authorized to send for papers and persons, administer oaths, to summon and compel the attendance of witnesses, to conduct hearings and have reports of same printed for use, and in addition to the usual fees allowed witnesses, to pay a reasonable compensation to experts appearing before the said committee; and any expenses in connection with such hearings shall be paid out of the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

Attest:

CHARLES G. BENNETT, *Secretary.*

[H. R. 22593, Sixty-second Congress, third session.]

AN ACT To amend an act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty seven, and all acts amendatory thereof by providing for physical valuation of the property of carriers subject thereto and securing information concerning their stocks and bonds and boards of directors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, be further amended by adding thereto a new section, to be known as section nineteen a, and to read as follows:

'Sec. 19a. That the commission shall investigate and ascertain the value of the property of every common carrier subject to the provisions of this act and used by it for the convenience of the public. For the purpose of such an investi-

gation and ascertainment of value the commission is authorized to employ such engineers, experts, and other assistants as may be necessary, who shall have power to administer oaths, examine witnesses, and take testimony. The value shall be ascertained by means of an inventory which shall list the property of every common carrier subject to the provisions of this act in detail, and shall classify the physical elements of such property in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

‘In such investigation said commission shall have authority to ascertain and report, in such detail as it may deem necessary, as to each piece of property owned or used by said common carrier, the original cost for railway purposes, the cost and value to the present owner, the cost of reproduction, and what increase in value is due to cost of improvements. Such investigation and report shall also show separately that property actually used in transportation and that held for other purposes, and shall contain a statement of the elements forming the basis of the estimate of value. Such investigation and report shall further show, whenever the commission may deem necessary, the history of the organization of the present corporation operating such property or of any previous corporation operating such property in such detail as may be deemed necessary. and any increases or decreases of capital stock in any reorganization and moneys received by any of such corporations by reason of any issues of stocks, bonds, or other securities, or from the net and gross earnings of such companies, and how the moneys were expended or paid out and the purposes of such payments.

‘The said investigation and report shall also show the amounts and dates of all bonds outstanding against each public service corporation and the amount paid therefor, and the names of all stockholders and bondholders with the amount held by each, and also the name of each director on each board of directors; and find and report the facts as to the connection of any bank or banker, capitalist or association of capitalists, or financial institution or holding company with the ownership, manipulation, management, or control of any stocks and bonds of any such company, and the transactions and connections of any bank or banker, financier, financial institution, or holding company with the reorganization of any such company in recent years.

‘Said investigation and report shall also fully cover, so far as practicable, questions pertaining to the issuance of stocks, and bonds by common carrier corporations subject to the provisions of this act, and the power of Congress to regulate or affect the same, and particularly methods to prevent the issuance of stocks and bonds by such corporations without full value being received therefor.

‘The commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and the value of its property in each of the several States and Territories and the District of Columbia.

‘Such investigation shall be commenced within sixty days after the approval of this act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

‘Every common carrier subject to the provisions of this act shall furnish to the commission or its agents from time to time and as the commission may require maps, profiles, contracts, reports of engineers, and any other documents, records and papers or copies of any or all of the same in aid of such investigation and determination of the value of the property of said common

carrier and shall grant to all agents of the commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to co-operate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct, and all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of this act shall have the full force and effect of law.

‘Upon the completion of the valuation herein provided for the commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, as may be required for the proper regulation of such common carriers under the provisions of this act, revise and correct its valuation of property, showing such revision and correction as a whole and in each of the several States and Territories and the District of Columbia, which shall be reported to Congress at the beginning of each regular session.

‘To enable the commission to make such changes and corrections in its valuation, every common carrier subject to the provisions of this act shall report currently to the commission, and as the commission may require, all improvements and changes in its property, and file with the commission copies of all contracts for such improvements and changes at the time the same are executed.

‘Whenever the commission shall have completed the valuation of the property of any common carrier, and before said valuation shall become final, the commission shall give notice by registered letter to the said carrier, stating the valuation placed upon the several classes of property of said carrier, and shall allow the carrier thirty days in which to file a protest of the same with the commission. If no protest is filed within thirty days, said valuation shall become final.

‘If notice of protest is filed by any common carrier, the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented by such common carrier in support of its protest so filed as aforesaid. If after hearing any protest of such valuation under the provisions of this act the commission shall be of the opinion that its valuation is incorrect, it shall make such changes as may be necessary, and shall issue an order making such corrected valuation final. All final valuations by the commission and the classification thereof shall be published and shall be *prima facie* evidence relative to the value of the property in all proceedings under this act.

‘The provisions of this section shall apply to receivers or carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the commission such carrier, receiver, or trustee shall forfeit to the United States the sum of \$500 for each such offence and for each and every day of the continuance of such offence, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act.

‘That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.’

Passed the House of Representatives December 5, 1912.

Attest:

SOUTH TRIMBLE, Clerk.

Bill as amended by subcommittee:

[H. R. 22593, Sixty-second Congress, third session.]

AN ACT To amend an act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, by providing for physical valuation of the property of carriers subject thereto and securing information concerning their stocks and bonds and boards of directors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, be further amended by adding thereto a new section, to be known as section nineteen a, and to read as follows:—

'SEC. 19a. That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of the property of every common carrier subject to the provisions of this act, and used by it for the convenience of the public. To enable the commission to make such investigation and report, it is authorized to employ such engineers, experts, and other assistants as may be necessary, who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this act in detail, and show the value thereof as hereinafter provided, and shall classify the physical elements of such property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

'First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for railway purposes, the original cost to date, the cost of reproduction new, the cost of reproduction in depreciated condition, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

'Second. Such investigation and report shall state in detail and separately from improvements, the original and present values of all lands, rights of way, and terminals used for railway purposes, ascertained by comparison with adjoining lands at the time of acquisition and at the present time, and separately the original and present cost of condemnation and damages or of purchase in excess of such comparative values.

'Third. Such investigation and report shall show separately the property held for other than transportation purposes, and the original and present value of the same, together with a statement of the methods of valuation employed.

'Fourth. In ascertaining the original cost to date of the property of such common carrier the commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks or bonds in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the moneys derived from the net and gross earnings of such corporations; and shall also ascertain and report upon the expenditure of all moneys and the purposes for which the same were expended.

‘Fifth. The commission shall ascertain and report the amount of any aid, gift, or donations made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time.

‘Except as herein otherwise provided, the commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

‘Such investigation shall be commenced within sixty days after the approval of this act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

‘Every common carrier subject to the provisions of this act shall furnish to the commission or its agents from time to time and as the commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to co-operate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct, and all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of this act shall have the full force and effect of law.

‘Upon the completion of the valuation herein provided for the commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, as may be required for the proper regulation of such common carriers under the provisions of this act, revise and correct its valuation of property, showing such revision and correction classified and as a whole and in each of the several States and Territories and the District of Columbia, which tentative valuations shall be reported to Congress at the beginning of each regular session.

‘To enable the commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this act shall report currently to the commission, and as the commission may require, all improvements and changes in its property, and file with the commission copies of all contracts for such improvements and changes at the time the same are executed.

‘Whenever the commission shall have completed the tentative valuation of the property of any common carrier, and the tentative valuations of its property in each of the several States and Territories and the District of Columbia, and

50206—23

before such valuation shall be considered in any proceeding involved in the act to regulate commerce, the commission, in addition to notices to petitioners and carriers required in such proceeding, shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and also by publication in three daily papers published in three of the principal cities through which the railroad of such common carrier runs; such notice shall state the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the commission. If no protest is filed within thirty days, said valuation shall become permanent.

‘If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this act the commission shall be of the opinion that its valuation should not be made permanent, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation permanent. All permanent valuations by the commission and the classification thereof shall be published and shall be *prima facie* evidence relative to the value of the property in all proceedings under this act.

‘The provisions of this section shall apply to receivers or carriers and operating trustees. In cases of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offence and for each and every day of the continuance of such offence, such forfeiture to be recoverable in the same manner as other forfeitures provided for in this act.

‘That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.’

Amend the title so as to read: ‘An act to amend an act entitled ‘An act to regulate commerce,’ approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof by providing for valuation of the several classes of property of carriers subject thereto and securing information concerning their stocks and bonds and boards of directors.’

Passed the House of Representatives December 5, 1912.

Attest:

SOUTH TRIMBLE,
Clerk.

Thursday, February 13, 1913.

COMMITTEE OF INTERSTATE COMMERCE,
UNITED STATES SENATE,
WASHINGTON, D.C.

The committee met at 10 o'clock a.m., pursuant to recess, for the purpose of further considering the bill (H. R. 22593) providing for the physical valuation of the property of common carriers.

Present: Senators Clapp (chairman), Crane, Cummins, Brandegee, Lippitt, Townsend, La Follette, Foster, Clarke, Gore, and Pomerene.

STATEMENT OF JOHN R. COMMONS, PROFESSOR IN THE UNIVERSITY
OF WISCONSIN, AND MEMBER OF THE INDUSTRIAL COMMISSION OF
WISCONSIN, MADISON, WIS.

Senator LA FOLLETTE. You are a member of the industrial commission of Wisconsin, not of the university?

Mr. COMMONS. Well I am both; professor in the university—I have classes in the university and I am a member of the industrial commission of that State.

The CHAIRMAN. You may proceed, Professor, in your own way, to discuss the bill before us.

Senator LA FOLLETTE. I will ask you to state, briefly, Professor, your connection with different institutions as a political economist, your training and experience.

Mr. COMMONS. My studies in political economy began in John Hopkins University in 1888. After that I taught the subject in Wesleyan University and in Oberlin College, the Indiana State University, Syracuse University, and for the past eight years in the Wisconsin State University. For one year I was connected with the industrial commission—

Senator LA FOLLETTE. Federal?

Mr. COMMONS. The Federal industrial commission, which made a lengthy report on various subjects.

Senator LA FOLLETTE. Did you prepare the report in part?

Mr. COMMONS. I drafted part of that report.

Senator LA FOLLETTE. What part of it?

Mr. COMMONS. On labor and immigration. I was for two years with the National Civic Federation, in which my work was concerned with taxation and labor questions. I was a member of a committee appointed by the Civil Federation to investigate private and public city monopolies in this country and in Europe, and I visited and reported on some 30 different plants in the two countries. That is published in the volume of the report of the National Civic Federation on Public and Private Ownership of Monopolies.

Senator LA FOLLETTE. Will you state what works you are the author of?

Mr. COMMONS. I am the author of various books—one on the distribution of wealth, a theoretical work; one on proportional representation, on trade-unions, labor problems, and one on immigration.

Respecting this particular subject, my studies have been largely of the theories of value of the Supreme Court of the United States. I assisted in drawing up the bill, or law, in Wisconsin regulating public utilities, and in doing that made as complete a study as possible of the decisions of the court and the phraseology which the court uses in passing upon valuations of property.

Senator LA FOLLETTE. In speaking of the public-utilities act of Wisconsin, you do not refer to the railroad-rate regulation statute?

Mr. COMMONS. The railroad-rate law was enacted—

Senator LA FOLLETTE. In 1905.

Mr. COMMONS. It gave the Wisconsin commission jurisdiction over steam railways. The public-utilities law was enacted in 1907, and extended its jurisdiction over all public-service corporations of the State. The latter was the one which I was especially connected with. Since that time I have followed up, in my lectures to my classes and in discussions, the trend of the opinion both of the courts and the commission in working out both this theory of value and the necessary facts which go to determine the amount of value which should be allowed, or the valuation which should be allowed, based upon those principles of value which the commissions and the courts have been working out; and it is rather from that standpoint that I would treat the provisions of this bill. For it seems to me that the term 'value' which is used here is a very ambiguous one. I refer to the term 'present value,' and 'cost,' and the various terms which were used the other day at the hearing which I attended.

The Supreme Court of the United States has really been working out a theory of value in the past 40 years, since the *Munn case*,¹ and has very materially recast its old conception or idea of what value consisted in.

The fundamental basis of the court's opinion is not market value or competitive value or actual value, but it is that of a fair or reasonable or just value. The court has recast its theory of value in rate making cases because it has perceived that in setting up a value for the property it has created substantially a creditor and debtor relationship; that the owners of the property are in the nature of creditors and the public is in the nature of debtors for something that has been devoted to their service.

Now, that is an entirely new relationship to what the court had considered before the Granger cases—that is, the case of *Munn v. Illinois*, decided in 1876. Prior to that time it was not considered that these industries were affected by a public use, or, at least, it was not so determined, and, as you know, the court decided in that case that here was an industry that had grown up which possessed a power over the public—a monopoly power. It was that feature which they decided characterized the corporation as having devoted its property to a public use, and which, therefore, entitled the public to control the property, including the fixing of rates. But the court did not enter into an idea of value at that time. They simply considered the two sides of the power to fix rates; that is to say, the reason why the court has this idea of a fair or reasonable rate is because the valuations which the court gets are always for the purpose of exercising some sovereign or coercive power of government over the property. As I see it, the object of the court in all cases of valuation is to place the property owner in the same position relative to other property owners as he would have been had there been no coercive valuation established; that is, to bring the relationship between different property owners on the same basis relatively to each other—not absolutely, but relatively—as they would have been had the court not made its valuation.

Now, prior to the *Munn case* the cases in which the court had to establish values, or pass and fix valuations, was, I think, mainly in condemnation cases, the exercise of the power of eminent domain. They had to pass upon the question of what is the

Munn v. Illinois, 1876, 94, U.S. 113

value of the property for the purposes of condemnation, and the theory which they used was simply what the property would sell for; what is the price of the property in the market, or rather, what would a person pay for it who was not compelled to buy it, and what would the owner sell it for if he was not compelled to sell it. In other words, it was a theory of free and fair competition. The only theory of value, as I say, was its market value based upon a fair competitive condition, and therefore, to place the person whose property was taken away on an equality with the other property owners, the other property owners must pay to him a compensation for his property the equivalent to what they would have paid him had there been no exercise of the coercive or sovereign power of the State in the premises. But when it came to the *Munn* case we had a distinction, a new classification, brought in. The court now adopted a classification in which this property was taken out of the competitive class, and the idea of the monopoly power, with the power to fix prices or rates, inherent in the property—what we might call the bargaining power of the property owner—was in excess of the power which he would have had under competitive conditions.

So the court sustained the notion that the only remedy for that excess of power was the exercise of the police power of the State in regulating its rates. And, as you know, the court did not attempt to say how far the police power might be exercised. It decided that it was simply a question of the bargaining power of the private owner against the police power of the people, and that if there was any abuse, or if any question arose of the justice of the rates, it was a question for the legislature or the people and not for the court to decide.

That was in 1876. Some 12 or 13 years intervened before the next case, the *Minnesota* case,² where the court now realized that the market value of property was more than the mere price that could be secured by selling the property, and that it depended upon the earnings of the company; that rates might be so reduced that they would not only take away the monopoly power but that they might take away the value of the physical property, which had been the only value that the court had had to deal with in these condemnation cases. So the court, in the *Minnesota* case, in 1889, took the ground that while the police power could regulate rates and could reduce the income, it could not go below a fair or reasonable limit. It must leave a minimum of value in the property which the owners were entitled to have and on which they were entitled to have a fair rate of return. But the court even then did not enter into the question of value, or valuation, it not being necessary to the decision in that case, and we may say that from that time, 1889, down to the present time—the latest cases being the *Consolidated Gas* case³ in New York and the *Knoxville Water* case,⁴ which were decided within the last two years, and possibly one or two more recent cases—during that period the court has been making a transition. It has been shifting its ground as to what is the value, or valuation, or the amount of value for rate-fixing purposes in these various cases that have arisen.

At the same time—about 1890 or 1891—that it decided the *Minnesota* case, it finally settled upon a theory of value for taxation purposes. This was in cases which arose in Ohio, I think—a series of cases—which might properly be called the *ad valorem* tax cases. The cases arose in the matter of express companies.⁵ According to the system then in vogue, or prior to that time in vogue, express companies and corporations generally were assessed by an inventory of their physical property, the express companies in Ohio on their wagons and horses and places of business, not including anything of their operating expenses, but purely a physical inventory. The court in those cases decided that the tax assessors might take into account other

² *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 1890, 134, U.S. 418.

³ *Willcox v. Consolidated Gas Co.*, 1909, 212, U.S. 19.

⁴ *Knoxville v. Knoxville Water Company*, 1909, 212, U.S. 1.

⁵ *Adams Express Co. v. Ohio*, 1897, 165, U.S., 194.

Adams Express Co. v. Ohio, 1897, 166, U.S., 185.

elements which might be called intangible elements; that is to say, they recognize that those physical elements had in themselves no earning power, no capacity to bring in an income.

In addition to these physical elements, there must be some legal privilege which gives them the right to do business, in the nature of franchises or good will, or other intangible elements, all of which, combined together with the physical property, constituted the going business or going concern. And so in those cases they developed what is called the unit theory of taxation—the taxation of property as a whole, including tangible and intangible elements. But if you notice the way in which they ascertained that value as a whole you will see the difference between the tax theory and the rate-fixing theory. They decided that the valuation for tax purposes should be the same as that on which other taxpayers were required to pay taxes. That is, real estate and property of that type is assessed on its selling value, or on what is practically the same thing, its earning power. So the court decided in these express company cases that whatever property was worth for income or sale it was worth for taxation. That was a just valuation and a fair valuation of property for tax purposes, because it placed the taxpayer on an equality with other taxpayers whose property is valued on earning or selling value.

That introduced a new classification of property owners as taxpayers, and the theory of a just value in that case was a valuation which would place all taxpayers in the same relative position towards each other as they would have been had there been no tax assessed and collected. It was a doctrine of just valuation, not of physical property, for the physical property now has disappeared from view altogether; it has no significance, provided the earning capacity is greater than the inventory of the physical property.

Now, many States began to adopt this *ad valorem* system of taxation of corporations on the strength of these decisions. Speaking for Wisconsin, that was adopted, I think, in 1903, prior to any system of rate regulation.

Senator LA FOLLETTE. That is, for taxation?

Mr. COMMONS. For taxation purposes. The State of Wisconsin, the State of Indiana, and several of the States, proceeded to set up tax commissions which should value these properties for tax purposes, and the issue was that of equal taxation; that they should bear their burden of taxes equally with the farmer and other owners of property. That equality could be secured by the capitalization of their income, or by the selling value of their property. In order to ascertain the selling value of their property they naturally adopted what is called the stock-and-bond method of taking the quotations of selling prices of stocks and bonds of that corporation on the exchanges and finding out the average total of all its representative paper. Whatever was outstanding and whatever property it had, or whatever future earning capacity it had, would be reflected, it was assumed, in the market value of its stocks and bonds. But the States undertook at the same time to make a physical valuation for taxation purposes. It is difficult to see at this date why they made the physical valuation because the property, after all, is assessed on its earning capacity, and that, in many cases, is in excess of the physical or inventory value.

But there is this one thing which shows how difficult it is to get away from the physical-value idea or the inventory idea. In the general popular opinion and in the court's opinion a physical valuation, the value of a tangible thing, is something as substantial as the physical thing itself; whereas valuation is not a physical thing; it is a relationship between people, between citizens of the same republic who are entitled to equal treatment. But that physical valuation for taxation purposes is used in cases where the earning value is less than the physical value, which seems to me to be an irrational principle. A corporation may have physical property worth a million dollars on its inventory; but it may be losing money, or it may be a bankrupt property, and so the value of that property, its stocks and bonds, may be much less than its physical value. Consequently, to carry out the theory, it would be necessary

to eliminate physical value altogether and to establish the market value of the property as a whole. That possibly might come about by the substitution of an income tax for an ad valorem tax, because the net income determines the market value.

I bring that in to show that the same confusion has arisen in rate cases, which I will mention later.

Now, during this period, following the ad valorem tax cases down to the present, or down to the last four or five years—you might say down to the time of the *Stanislaus* case,⁶ decided in 1902, which came up from California—the court was very undecided as to what were the elements of value which should be taken into account. That is typified in the decision of the *Smythe* case in 1898.⁷ In that case the court enumerated many things which should be taken into account. I am quoting second-hand from the decision contained in the volume by Whitten on the Valuation of Public Service Corporations, recently published, which is valuable in that it contains practically all the decisions of commissions, opinions of engineers making valuations, and of the various courts.

Senator LIPPITT. Will you put into the record where that is published?

Mr. COMMONS. It is by Robert H. Whitten, who is connected with the public service commission of the first district of New York. The title is 'The Valuation of Public Service Corporations. Legal and Economic Phases of Valuation for Rate Making and Public Purchase.' It is published by the Banks Law Publishing Co., New York, 1912.

Remember that during this period, we may say, the corporations whose property was to be valued for rate-fixing purposes, generally held that there could be but one value to property, and that value is something inherent and intrinsic. If you have found the value of a thing; that is, the correct valuation for all purposes—rate-fixing, condemnation, taxation, special assessment, or for whatever purpose the Government or the State chooses to exercise its sovereign power. Consequently the court at that time included the elements which, I think, are now recognized by the courts and by the corporations as not germane to a valuation for rate-fixing purposes. Notice the terms which they use. It must be—

the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value the original cost of construction—⁸

Remember those terms were vague at that time; there had been no investigation of these various terms. They have become more definite since—

the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks—⁸

Which I would characterize as its 'present value'—

the present as compared with the original cost of construction—⁸

That is, the present cost of construction would now be defined as cost of reproduction new, or cost of reproduction less depreciation—

the present as compared with the original cost of production—

A term which is introduced in the bill—

the probable earning capacity of the property under particular rates prescribed by statute—⁸

⁶ *Stanislaus County v. San Joaquin and Kings River Canal and Irrigation Co.*, 1904, 192, U.S., 201.

⁷ *Smyth v. Ames*, 1898, 169, U.S., 466.

⁸ *Smyth v. Ames*, 1898, 169, U. S., 466 at page 546, opinion of Mr. Justice Harlan.

That is, the value of the property after the rates have been changed—

and the sum required to meet operating expenses are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.⁸

It was not necessary in that case to decide what should be the value placed upon property, because the court found, under any theory of value which it might adopt, and even on the matter of meeting the operating expenses, including depreciation, that the rates were so low that they would not meet the expenses. So it was not until later cases that the court passed upon an actual valuation for rate-fixing purposes.

Now, the only valuations which they had passed upon up to this time were valuations for taxing purposes; that was a valuation based upon the earning power of the company, and the court was very soon faced with this predicament: The corporations asked that their value for taxing purposes should be the value for rate-fixing purposes. That meant that the capitalization of their net income, or of their expected future income, should be the value upon which rates should be calculated. But the court perceived that that future income, or expected income, which gives a present market value to the property, is itself based upon the very rates which are proposed to be changed. Consequently it was evidently reasoning in a circle. They were asked to use as a basis of reasonable value the very valuation which was called in question, based upon the very rates which were proposed to be changed. The reasoning in a circle was recognized promptly by the corporations, and is no longer contended for, because it is palpably merely a doctrine of 'whatever is, is right.' The actual fact is that whatever is, is. It may be right and fair and reasonable or it may not be. It depends upon the purpose for which the valuation is made. And so the court has been compelled to find some other standard of reasonableness different from that which is reasonable in taxation cases, based as they are upon rates and expected earning power. They first turn to the valuations which had been going on in the country by engineers.

An engineer is commissioned by a syndicate, we will say, proposing to buy a municipal electric plant, or proposing to buy a railroad or whatever it may be, and he is employed by the syndicate to make a valuation of that physical property. The corporation and the engineer have in mind the earning power of the property—its future expected earning power. They must know the physical valuation and depreciation and operating expense, on the one side, which the engineer can furnish them. But, on the other hand, they must have a legal right to do business—that is, they must have a franchise, a protection of good will, or, in case of railroads, the power of eminent domain; they must have the right to sell their product or service to the public and to secure from the public a price for that product or service. Consequently the principle on which the engineer values the property is something like this: What would a corporation owning a franchise but not owning the physical property be willing to pay for that property rather than build another property like it? In other words, the theory was one of a semicompetitive condition. Here is a franchise which confers a monopoly power to fix prices, but the owner of the franchise does not have the necessary physical equipment by which he can produce the service and which alone is what the public wants.

He has the power in his franchise to fix prices, or the income, which the public shall pay after that physical property has been installed and is a going physical property, including all of the cost of engineering, overhead, and everything that would be necessary from an engineer's standpoint to get it up to the point of delivering a product that satisfies the needs of that community.

⁸ Smyth v. Ames, 1898, 169, U.S., 466 at page 546, opinion of Mr. Justice Harlan

So there is a remnant of the competitive idea still in the attitude of the engineer who makes the valuation. He is thinking of the power of that physical property to produce an income by virtue of the service it renders to the community, and the purchasing syndicate must necessarily have that estimate in order to get at its operating expenses and thus to determine its net income. By that means it determines the total value which it will pay for the property as a going business, including the franchises. So there is likely to arise there an intangible element owing to the value of that franchise. If the franchise is a contract which fixes prices that can not be changed and can not be regulated, then that franchise itself must be valued, and its valuation is based upon the prospective net income, based on the rates which it can charge and the probable continuance of those rates.

That is the cost of reproduction theory, or what is practically the same thing, the cost of reproduction less depreciation, because, of course, if the property is depreciated and is continually going to depreciate, it is going to involve expenditures to keep it up to operating efficiency.

The first case, I think, in which the question of depreciation came before the Supreme Court was in the Knoxville water case,⁹ a couple of years ago. The court then took another step in advance. In that case it decided that the cost of reproduction new is not necessarily the fair value of the property, and we might say—and I think the engineers would agree, that the true physical value is the cost of reproduction less depreciation. When we get down to the true physical value it would be of that character, and if there is any valuation in addition to physical value it must be cared for by some form of intangible value.

The court recognizes this, that over and above this physical value, less depreciation—which I would call the true physical value—there might be privileges of an intangible character which would themselves have value—franchises, good will, the right to do business, and those market connections with the public which imply the right to serve the public and to secure prices for the service.

Now, the court has passed upon some of these intangible values, and they have adopted the same principle in valuing intangible property as in valuing tangible property. I think this bill properly cares for the situation, because it provides for valuing all the property. That means all physical property and all intangible property—the whole property of the corporation. The court, as I say, made rather definite its notion of what intangible property is worth for the purposes of rate fixing. The intangible property really is represented in the form of a franchise or good will or eminent domain, which represent the power to maintain prices in the future and thereby to secure an income in the future. The court in the Consolidated Gas case¹⁰ in New York decided that the capitalization of a future expected income, of an intangible property over and above—

Senator LIPPITT. When you say the court do you mean the Supreme Court?

Mr. COMMONS. Yes, sir; the Supreme Court. I refer to the Consolidated Gas case which came up from New York. It has decided in that case that the expectation of a future income alone is not entitled to capitalization for rate-fixing purposes, but if that tangible property has cost something, if the corporation has paid something for it, the amount that they have paid is a true investment, a real cost, and measures the amount of property—of their own property; that is, their money which they have devoted to the service of the public. And, consequently, if it can be shown that in the acquisition of a franchise or an intangible element a company has been required to make a payment for paving, to pave between the tracks, or if it has incurred legal expenses, or, as in the Consolidated Gas case, if it has bought from previous owners of those franchises and paid them an ascertained amount for those franchises; and further, if the legislature has legalized that transaction, then that amount so paid may

⁹ Knoxville v. Knoxville Water Company, 1909, 212, U.S., 1.

¹⁰ Willcox v. Consolidated Gas Co., 1909, 212, U.S., 19.

be capitalized. And so the court capitalized the franchises in the Consolidated Gas case to something like the extent of seven or eight million dollars.

Now, that case, as it came up from the lower court, had given a different value to the franchises. It had tried to estimate the future increase or appreciation of the franchises from the date of that original purchase up to the present time, and it did it by analogy or comparison. It took the values of real estate in New York and found what was the probable or estimated increase in real-estate values since the time when that purchase of the franchise was made. The lower court applied the same increment of increased value or of appreciation to the franchises that had redounded to the benefit of the landowners during the same time. But the court declared that that was not applicable, and the reasoning apparently is this: The corporation owning the franchise has a public privilege. It has devoted its property to the service of the public, and although the public needs may be increased and population may grow larger, and consequently the intangible element might be more valuable, yet the fact that it was a public donation, a public privilege, did not entitle them to capitalize it as against the public that granted it. It could become a creditor and the public a debtor only to the extent that it had really made an investment, and that investment was to be discovered by going back in the record and ascertaining as near as possible what the original cost was.

So the court in those cases, it seems, has plainly indicated the necessity of getting at original cost, from the very fact that it has been compelled to pass upon, not only physical value, but the intangible value. The concept, the idea or principle, of original cost has not as yet been fully passed upon by the Supreme Court. There are two or three State commissions which are making valuations on the principle of the original-cost idea. In the State of Wisconsin the commission there for a few years past has been going over the history of the properties in great detail with their accountants to find out what were the actual prices paid. They have established by market quotations the prices of rails during a period of 40 or 50 years, so that they can check up the books of the company by the current prices of water pipe as an index of movement of prices over those years. The State of Washington is applying that to the railroads, and possibly other States are doing the same through State commissions. I do not know that these cases have come up to the Supreme Court of the United States, although they have been passed upon in Wisconsin by the Supreme Court of the State.¹¹

The court or the commission, then, must necessarily treat these three items. It must have this engineering cost of reproduction: it must have the cost of the property less depreciation, and it must have its historical cost in order to get a true, fair or reasonable value. It may be that none of these is reasonable, and it must check and compare in order to see where it is coming out. It could not properly make a mere arithmetical compromise or average between them, but it should work it out on some principle.

Now, the idea of original cost involves much more than physical property. It is an accounting proposition, for one thing, because it must take into account all those elements mentioned in the fourth section of this bill, which I think is the financial history of the property. It must take into account what the bonds have been sold for in the past, that is, the amount actually realized; that is, I would take it, equivalent to 'the cost of the property to the present owner,' if I understand what is meant by that term. If it means the corporation is the owner, then it evidently means the price which the present corporation paid for that property at the time of acquisition.

Now, that may have been much less than its physical value. It may have been in a period of depression, when the property was not earning a profit or the property may have been purchased on foreclosure, so that the cost to the present owners at

¹¹ City of Whitewater v. Whitewater Electric Light Co., 1910, 6, W. R. C. R. 132.

¹² City of Racine v. Racine Gas Light Company, 1911, 6, W. R. C. R. 228.

¹³ City of Janesville v. Janesville Water Company, 1911, 7, W. R. C. R. 628.

that time may have been much less than the physical value. Or, the purchase may have been made through some form of manipulation or combination or deception of the public by a syndicate, consolidating several corporations, and thus entrenching its monopoly and thus increasing its prospect of future revenue and income, thereby giving a greater present value or valuation at the time of acquisition than the physical property.

So that, going back to the subject of ascertaining the original cost, everything that is involved in the question of cost to the present owner is included, and can not be avoided. It is included, however, under this condition, which the court carries through all of its reasoning on these questions, that that price or cost must have been reasonable. But if there has been fraud or misrepresentation, or monopoly, unwarranted and unjust and unfair to the public, that must also be considered. If, on the other hand, the company has been in severe straits, has not been earning dividends, and therefore the purchase was a sacrifice sale or price, or cost, that must be given due weight. In the treatment of these questions, which have been more or less touched upon by the courts, the idea is to find what, under normal and reasonable conditions, would have been paid at that time. And I think that is the reason for using the term original cost instead of actual cost, for the real thing that is meant to be determined is the actual cost at the time of acquisition. But actual cost may be very different from reasonable cost. It may have to be an estimated cost, if the books are lacking; that is, the probable cost at that time. Consequently, the term 'original' I think has come to be pretty well recognized by commissions, by engineers, and accountants, as well as in those cases which come up to the courts, as a basis upon which to ascertain the actual cost. The term 'original' is equivalent to actual as against speculative or hypothetical.

There is a further advantage in going back to the original cost, in this sense: Cost of reproduction new, or, as I would prefer it, cost of reproduction less depreciation, is based upon the present prices, or cost of labor and material, and it allows for a supposed period to construct the plant. The engineer takes, for example, a water-works system. He says it will take two years to construct another plant of the same kind.

If we should begin now, having a franchise but not having a plant, it would cost us to construct that plant at the present prices of labor, the overhead, engineering, and legal expenses. There would also be the item of interest lost during the construction period, and, in addition to that, a period of doing business at a loss—of building up the business. So that the cost of reproduction new would take into account all of the factors as if we were starting now and were to build a plant during two years, or an estimated period in the future.

SENATOR TOWNSEND. Do you take into consideration the earning power of the road for any portion of the time that it is being built?

MR. COMMONS. No, sir; I am starting upon the proposition that a company has the franchise or the right to fix prices, or the right to earn an income, and having that franchise, it simply asks for a valuation of the physical property which will be necessary to go with that franchise. I will say this, however, on that question, that the earning power is taken into account when there is a franchise in existence which has a certain income; for example, during the period of construction of the plant, there is a loss of profit, a loss of interest. Then during the period following that which would be necessary to build up the income to its present actual income there is another period of building up the business where the actual net income is presumably less than the present net income.

That is to say, to illustrate, suppose that there is a net income of a hundred thousand dollars a year after the plant is constructed and ready to serve the community. It has not yet secured all the customers which are necessary to make that \$100,000 income, and the engineers estimate a period of building up the business to its present basis, which may be two or three years. That involves a loss or a deficit

during that period. That amount they add to the capitalization as a deficit which the owners have suffered during the interval. But that is based upon the assumption that the present franchise will continue. It involves no question of reasonable rates at all. It involves the question of the actual present income which they are securing.

I was going to show why this original cost notion is preferable to the reproduction idea. If you take the cost of reproduction based on the present prices, you must consider that those prices are changing. During the past 10 or 12 years the cost of reproduction theory, when prices have risen 30 or 40 per cent, would give a value probably greatly in excess of the actual or original cost when the property may have been constructed during 8 or 10 years of low prices. That would give an advantage to the corporation against the public. On the other hand, during a period of falling prices, which also is characteristic of prices in general, especially so in going over the whole period of the railroad history, taking original pieces of rails at \$50 to \$100 and the present prices at \$28 or \$22, or whatever it may be, it would be to the disadvantage of the company and in favor of the public.

But that might be eliminated—and is attempted to be eliminated in many cases—by taking the average price over a period of both falling and rising prices so as to get a fair average which would not represent the height of the peak or level of prices, nor the lowest point. I think that a five-year period is used by the Wisconsin Commission. But the original cost notion gives the actual cost of that particular property without any speculation or averaging under actual conditions when it was purchased.

Again, in that actual cost there is another element which is involved, and that is the fair rate of return during the period of business. The court starts with the assumption that these corporations have devoted their property to the public use, and therefore during their history they were entitled to a fair rate of return. That rate of return might have been high when business was new and speculative and might decline as business becomes safe and population increases. But if during the history of the plant, working it out through accounting and depreciation, it should show up at the end that there is a deficit—that the company has not been earning a fair rate of profit—it would necessarily show itself in a deficit as compared with the physical value which it has; that is to say, we have the physical value less depreciation before us. That is a tangible physical value. But to get that property at that present time, historically, they have scrapped a lot of property; they have had depreciation; they have lost things; property has disappeared. One of the suggestions made here was that these should be taken into account, that the commission should take into account property worn out and displaced by improved property for the betterment of the service or for more economical service to the public. That necessarily is taken into account in the historical treatment of the case, and is necessary because they must arrive during this historical period at a fair rate of profit on the value of the property during that time.

Now, if there is a deficit, if the earnings have not been great enough, that would have to show itself in a new kind of intangible value which has generally come to be known as 'going value.' Going value differs from good will and franchise value in that it is a true cost; it is a true investment on the part of the owners. It is an investment in the sense that the company might have invested its money in other business which would have given it a fair rate of return. Investing it, however, in this business, it did not get that fair rate of return. Consequently, in order to put the owners or investors of that property on an equality with other investors, the public, which pays the bills, must make up to the company that deficit. It does not involve a theory of interest at all. It simply involves equality—equal treatment of all investors, on the theory that investors are getting a fair profit under competitive conditions—and, therefore, this company, if it has not been able to get that fair rate of profit, is allowed to accumulate the difference in the form of a deficit and add that to the physical value as a going value, or an intangible value, credited to the

company as a charge against the public, on which the fair rate of profit can be secured.

Now, notice that this involves the addition of an intangible value, not based on future earning power like a franchise or good will, but based on a past investment or cost, as compared with other investments; that is, not only what they actually paid for cost of construction is investment, but the income they could have secured, but did not secure, in comparison with others who received a fair return, is also a cost, and therefore an investment.

Senator LA FOLLETTE. If I may ask you there, is that what it costs to build up the property to the point of earning a fair income after the physical structure is complete and from the time it is set in motion?

Mr. COMMONS. I think it is. I think it is possible to figure it out on that basis. I think Senator Townsend asked me a moment ago a question which should be considered in connection with that. He asked, where there is a deficit, do we take the earning power of the company into account and the loss of profit during the period of building up the business until it reached that earning power. I said, then, that we do, if we consider that that franchise and the rates charged are not to be changed. But supposing they are to be changed to the reasonable rate of 6 per cent. Suppose that \$100,000 is 15 or 20 per cent—an extortionate rate. It costs the company something by way of deficit to build its business up to such extortionate rate. That would, of course, allow a large element of going value, or lost profit, during the period that it was building up its business to secure the extortionate rate. But there can also be a going value based upon a reasonable rate. Suppose that \$100,000, figured at what the court would consider a fair or reasonable return of 6, 7, 8, or 10 per cent, or whatever it may be decided under the circumstances, is fair or reasonable. There would also have to be a period of the building up of the business until it reached a reasonable rate. So we may have going value based upon the deficit secured during the period required to reach a reasonable rate of profit or we may have going value based upon deficits measured from an extortionate rate of profit. The courts do not allow the latter in intangible values, because the idea of reasonableness must be applied throughout the whole proceeding.

If you are building up a business until it can reach an extortionate rate of profit and you capitalize the deficit below that extortionate rate, you have done injustice to the public as debtors in a twofold direction: You first allow the corporation an extortionate or unregulated rate of profit, and then you allow it the deficit during the period of reaching that extortionate rate of profit. A going value figured upon the future permanence of the existing rates which are not reasonable and have not yet been tested by the standard of reasonableness would be an unreasonable going value. The idea is that the intangible element must itself be a reasonable valuation; that is, the deficit must be reasonable; and that is taken into account I think necessarily, in this measure before us where it mentions the items of a financial or historical account of the property.

Senator LA FOLLETTE. Mr. Chairman, I observe that it is past the time of the convening of the Senate this morning, and we want to adjourn at 15 minutes to 12. I will ask that the committee resume its hearings to-morrow morning at 10 o'clock, and have Prof. Commons resume his statement. Senator Cummins has kindly consented that the regular order before the committee at that time, which was the consideration of his report, might be deferred in order to enable us to get along with the hearings on this bill.

The CHAIRMAN. Unless there is objection, the committee will take a recess until to-morrow at 10 o'clock.

Accordingly, at 11 o'clock and 55 minutes a. m., the committee took a recess until to-morrow, Friday, February 14, 1913, at 10 o'clock a. m.

Friday, February 14, 1913.

COMMITTEE ON INTERSTATE COMMERCE,

UNITED STATES SENATE,

WASHINGTON, D.C.

The committee met at 10 o'clock a. m., pursuant to recess for the purpose of further considering the bill (H. R. 22593) providing for the physical valuation of the property of common carriers.

Present: Senators Clapp (chairman), Crane, Cummins, Oliver, Lippitt, Townsend, La Follette, Tillman, Newlands, Gore, and Pomerene.

Statement of Prof. John R. Commons—Resumed.

The CHAIRMAN. You may proceed, Professor.

Mr. COMMONS. I had spoken of the valuation for tax purposes, and a comparison of that value for rate-making purposes, and I should like to recur to that distinction in order to show the basis on which the court has changed its classification of property.

In the case of taxation the principle of equality, or equal treatment of all property owners as taxpayers, is based upon their ability to pay. They must contribute to a common expense which is distributed, not according to the benefits they receive, but according to their ability to pay. Their ability to pay depends upon the income they can extract from the public in return for the services which they render to the public. That income further depends upon the prices or rates which they can charge for those services. Consequently, in classifying property according to its ability to pay, you may classify it either by its net income or by the present capitalization of its future expected net income.

Senator TOWNSEND. Do you refer to all property now?

Mr. COMMONS. All property. I think the value of land is based on the same principles which the value of any property for sale or purchase is exchanged, on the basis of the future net income which it will bring to the purchaser. He capitalizes his expectation. Now, that expectation consists in the prices which are at present being paid, the certainty or uncertainty of the fluctuation of those prices, and the probable duration at which the prices will continue to be paid. All property that is assessed on the ad valorem principle is assessed in that way. That is quite different from an inventory of physical property. The physical property, inventoried at what it would cost to reproduce it, or even at what it would cost to construct it, or what could be secured by the sale of it, is merely a dead piece of physical material. It has no value unless it is connected up with a market to which its services can be rendered and from which its income can be derived. So, in treating property for taxation purposes in the case of corporations, based on the ad valorem system, we would naturally look to the value of the titles to that property; that is, to the market value of its stocks and bonds, because, I take it, the market value of its stocks and bonds depends upon its future net income from operating revenues less operating expenses. In order to get that net income it has to undergo an expenditure of operation, and under operation necessarily is included the maintenance and repairs and the depreciation charge to keep up the physical property. Also, of course, materials, supplies, labor, etc. On the other hand is the gross income from operation. The difference, whatever it may be, between the two is essentially that which the stocks and bonds

represent, or the market value of the stocks and bonds. They are entitled to that future expected net income.

The ad valorem system, as I indicated, is weak, in this sense, that it attempts to make use of physical value, or inventory value of physical property, and in case the net income does not capitalize in the form of market value of stocks and bonds so that it will be equivalent to the inventory of the physical property, evidently that physical property is worth less than its inventory value. It appears to me that if a case were properly presented to the court according to the court's principles of ad valorem taxation based upon ability to pay, it would disallow the physical value, or inventory value, in the case of a company whose market value was less than the physical value of its property. The party owning that physical property is placed at a double disadvantage compared with other people owning property. He is owning a losing property, in that he suffers a loss as compared with other people. Then the State turns around and penalizes him for being the unfortunate owner of that losing property. It taxes him, not on its earning capacity, or the present capitalization of its earning capacity, but taxes him on a supposed physical inventory.

That situation arises, I think, from the transition period through which the court is going from the time when we had only physical property and there was not this intangible market value owing to the extension of the markets. The dependence upon the prices received for the sale of products over the wide extent of the United States as a whole, is a new thing. Even that valuable property known as good will, in this country, is not more than 70 or 80 years old. It was not recognized by the courts, or at least by the Supreme Court, as a valuable piece of property until it became associated with such things as trade-marks, reputation, and franchises. It formerly meant merely a business situation—practically a land value—but has come now to be an intangible value, which can be separated from the physical property.

In the course of making that transition, which is not yet completed, apparently the court and the assessors hold on to the physical valuation, which does not represent ability to pay in all cases and does not represent earning power.

In the case of rate fixing, the same fallacy arises in the transition from the old valuation, but in the reverse direction; that is to say, the principle in rate fixing is not the ability of the corporation to pay taxes, but it is what might be called the ability of the corporation to serve the public, and its ability to serve the public depends upon the cost of its service—what it reasonably must pay or expend to serve the public. But, on the other hand, the public must pay in compensation for that service the reasonable return which other investors secure if they are not subject to duress, and if they do not possess power of coercion over others, or monopoly power. The consequence is, if in the course of its history there has been an accruing deficit, indicating that they have not been able to earn this reasonable rate of profit, that is an accruing credit on their side as against the public. It represents an element of expenditure compared with what other investors receive. It is a loss on the part of this particular investor which is properly capitalized and represents an uncompensated service, and that, I take it, is the notion of the court in its theory of investment value. It is that accrual of uncompensated services which has been rendered to the public—a service which the public has not yet fully compensated.

Senator TILLMAN. Professor, does value ever become irretrievably lost? Does there ever come a time when a man who has invested in an unproductive piece of property shall cease to demand compensation from the public for his bad investment?

Mr. COMMONS. I am speaking now of the valuation from the standpoint of the court, which involves the question of reasonable value, and reasonable value means that all of the circumstances must be taken into account, whatever they are. If one of those circumstances consists in the fact that the management has been injudicious, or has not properly conducted its affairs, or if it has been corrupt, or if it has tried to exert a power to which it was not entitled, the court would necessarily take that into account. If, on the other hand, its property has depreciated, if property which

it has devoted to the service of the public has depreciated and fallen off in value, through no fault of the management but through natural causes, then the public is required, under a system of equivalence between the service rendered and the price paid, to make good that falling off in value. That is cared for on accounting principles by putting into operating expenses an account for maintenance, repairs, and depreciation. The depreciation, if properly calculated and properly accounted for, would require the public, on a theory of equivalence, to maintain that property in its operating efficiency, and not only in its operating efficiency but in the amount of value which the investors have actually put into it.

Now, that is a question of great detail, which can only be answered when the case comes up, and the court and the commission would evidently enter into that question. It is much more than an engineering question. It is an accounting question; it is a question of just compensation; it is a question of the past history of the actual property that is being considered. If in this figuring out of the true investment it is found that that is greater than the physical valuation—and I use the term physical valuation always in the sense of depreciated condition—if the investment value, or the true investment value, is greater than that physical inventory, then there appears an intangible element which represents a true cost to the investor in exactly the same sense as expenditure which he may have made for construction, and should be treated, and is treated, I think, or at least intimated in the decisions of the court, so far as that question has arisen. But, on the other hand, if there has been, in the history of the company, a balance on the other side, if the public has paid to corporations not only this fair and reasonable profit on its true investment, but there has been an accruing surplus which, after offsetting all reasonable deficits, represents only the power of extortion or monopoly, and not the fair and reasonable return, then to the extent that it is found that there is this extortionate surplus it is properly a deduction from the physical value which they have on hand.

In other words, the amount of value on which the company is entitled to earn a profit is the amount of its real or reasonable investment—the amount which the owners have taken out of their own pockets, which they might have invested elsewhere under fair competitive conditions and secured thus a fair competitive return. But if the public has paid a higher rate, and that higher rate has gone into the new construction of physical property, that excess of the inventory value of the physical property does not represent a credit on the side of the company against the public, but represents a contribution which the public has made toward the physical property. In carrying out the principle of the classification that investors should be placed on the same level as other investors, that the classification in this case is not classification of property according to ability to pay but according to the fair cost of the service, then the surplus to that extent would be deducted from the physical value. We have the same situation that we had in the case of taxation. In that case the earning value, if it is less than the physical inventory, means that the value of the property for taxation purposes is less than the physical value. And so, in this situation, if the true investment is less than the physical value or inventory value, then its ability to serve or the cost of its service to the public is less than that which is represented by the capitalization against the public of its cost of reproduction.

Now, I do not know that any cases have come to the courts involving these questions, either in taxation or in rate fixing, and that is the very reason why this bill should provide for this original cost to date in order that the court may have before it the actual facts and the amount of differences involved in these different methods of valuation. It must have these facts in order that it may have a basis, first, of checking up one by the other, and, second, of passing upon the due weight, the just weight, which shall be given to these different elements. The court must eventually add up and deduct and reach a total value of the property as a whole—and it can not do it if we have not laid before it the facts, properly analyzed, upon which it can listen to arguments regarding the true principles involved and then pass upon the

facts before it and assemble the different elements according to its judgment of what is fair and reasonable in the case.

The question of the value of right of way of lands and terminals, it appears to me, should be analyzed on the same principles and in the same way. The lands and terminals have a present value according to the reproduction new theory, based upon what a company would be required to pay if it had no right of way but had the power of eminent domain to secure a right of way. Should it proceed to reconstruct its property in its present depreciated condition—which includes also its present appreciated condition, in the case usually of land values, rights of way, and terminal situation, not improvements—we would have, of course, in that case cost of reproduction-new, not cost of reproduction in depreciated condition. It would be cost of reproduction in appreciated condition. But if we go back to the principle of getting at the original cost, taking up the actual history of the property in question and inquiring from its books—and, if they are not available, from comparisons with adjoining property at the time when the acquisition was made—we could find what was the original cost or price to the corporation in the acquisition of this right of way and terminals.

Now, the securing of those two items would make it possible for the court to consider this question, whether a railroad corporation is entitled to an appreciation in its land values equivalent to the appreciation which private owners adjoining have enjoyed in the appreciation of their land values. If the court should classify the corporation as similar to private owners, should adopt a classification, determining that in this case the corporation is a landowner similar to adjoining landowners, the court would necessarily conclude that, treating all landowners on an equality, the corporation is entitled to the appreciation which others in the same class have enjoyed. But it is possible that the court might classify the railroad, as a landowner, differently from private owners. Private owners have secured their land under free and fair competitive conditions. In the case of the railroad, they have secured their land through the grant of a sovereign power, the power of eminent domain, or they may have secured it through grants by cities or street privileges, street crossings, or highways, or they may have secured it by a compromise purchase. Knowing that they have ultimately the power of eminent domain, or condemnation, they might be willing to pay the actual owner something more than the current value of his land, but something less than what it would cost them in the legal proceedings for condemnation. That fact would be brought out by this original cost idea. The commission would be required to find the actual cost at the time of acquisition, and in addition to that, the excess, which was in the nature, we may say, of overhead or legal expenses of securing their charter, privilege of eminent domain, and of paying damages to adjoining property, etc.—things which engineers have well recognized as summed up in cost of condemnation. That item is treated as a true cost.

Now, if the court should classify railroad corporations possessing the privilege of eminent domain in the same way that it has classified municipal corporations possessing municipal franchises, it would treat the eminent domain privilege as a franchise and would figure out that, so far as the company had actually paid a price for the land and the costs of condemnation at the time of acquisition, it was entitled to capitalize that amount against the public and receive a fair return upon the same. But, if, on the other hand, there is any appreciation in that property, which is the appreciation not merely of the land but appreciation in the hands of the corporation of a sovereign power which the people have granted, it might not be capitalized against the public that had granted this privilege.

Of course, it is impossible for anyone to say what view the court might take on that question. As I understand it, it goes back to the fundamental principles of reasonable classification and it would have to be presented to the court on that ground. The facts, however, have not been ascertained in any State that I know of, except the State of Washington. I think that State has made a valuation of rights of way, etc., on the two principles—original cost and present cost of reproduc-

tion. It is essential, if we are going to have the court pass upon that question, that the facts should be collected which would be germane to the decision; then the court would give the due weight which the elements are entitled to according to whatever prices seemed fair and reasonable to the court. The business of the commission and its corps of valuation experts would be to present these facts so that the decision can be made by the Supreme Court.

These questions of valuation, I think, have a very important bearing on the personnel of the staff that is to do the valuing. It appears to me that this is much greater than a problem for engineers. It has been suggested here that there should be created a board of engineers, partly appointed by the commission and partly by the railroads—partly by the engineering associations, possibly by the War Department, etc.

The engineer is essential in making this valuation. It can not be made without his assistance, but all that he can make is a physical inventory. As engineer it is not his province to go into the constitutional question of reasonable value. For that purpose the valuing board would need a constitutional lawyer, a person familiar with the decisions of the court and the principles of reasonable valuation as against market valuation. The engineer's idea of values is usually confused. He does not distinguish between what you might call the engineering use, or engineering value of the property, and its valuation as a charge against the public. For example, an engineer would value property according to its operating efficiency, and if there had been a depreciation account so calculated that it would wipe out the value of a piece of property in 30 years, the public would pay in the form of depreciation as operating expenses an amount which would eliminate the value of that piece of property in that period. But if the engineer finds that that piece of property nevertheless has an operating value that will turn out, not value to the public, but turn out products or service to the public, he gives it what he calls a 'minimum service value'; that is, it is still valuable as a piece of mechanism to turn out service, even though from the standpoint of the public its value as a charge against them has been entirely eliminated through a depreciation account. In that way the engineer, not understanding that in making an inventory of physical property he is setting up a charge against the public in doing so, confuses his idea of operating value, or operating efficiency, with this other entirely different idea of a credit and debit relation between the investor and the public.

Now, to correct the engineer in that computation it is necessary to have an accountant. An accountant is just as essential to this valuation as an engineer, and the engineer's value should be made under the direction of others who have the idea which is involved in this case of reasonable value. I should say also that there should be needed an economist, because the court is really acting as a kind of faculty of political economy. They are working out a theory of value which economists are also working out; the two theories do not always gibe. But there ought to be somebody there who knows the literature and the theories of value, so that he can properly weigh the different theories and properly distinguish between them, and also between this reasonable value, which economists do not usually take into account, and these market values which are the dominant ideas in the minds of economists. That is to say, this valuation staff should be more than engineers. It should include experts in all of the elements involved in the valuation.

As to the organization of such a commission as has been proposed, it appears to me that unquestionably the organization should be under the control of and the appointment of the valuers should be made by the Interstate Commerce Commission. It should not be made by any outside party. It should not be made by the railroads, or by the President of the United States, or by the Supreme Court, or by the associations of engineers, but should be made by the constituted authority that is required ultimately to pass upon the item which these valuers present to it for their own judgment in massing them together and thus creating a total value. This is the

function of the commission. These various elements which have come in through these subordinates who do the field work are preliminary valuations. They possess no legal authority whatever. They have not yet gone through that test of public hearing or argument, of ascertainment and determination and final fixing, which is the function of the Interstate Commerce Commission. If we have a disjointed system in which we have on one side valuers who are working on their own ideas without knowledge of the ultimate use that is to be made of their results or without being told by those who make the ultimate use, we should have a system of uncertainty and perplexity which could hardly be overcome. It would be guesswork. The analysis would not be made with the same object in view that the Interstate Commerce Commission had.

But at the same time I think it is necessary to recognize that according to the whole scheme of valuation the railroad companies would have their own staff. It might be very proper—and, in fact, I think it is the actual operation of valuing in different State commissions—that the railroad corporations are more or less joined together and create a joint staff paralleling the staff of the commission. They must work together. The accountants of the commission must work with the accountants of the company on the books. The engineers must work on the inventory with the engineers of the corporations. Any points that they can not decide upon must go up to the higher authorities both in the commission and in the service of the corporation. The valuation must necessarily be a co-operative affair.

Senator TOWNSEND. What higher authority do you refer to?

Mr. COMMONS. I am speaking of the valuation staff—at least, what I call the valuation staff—as distinguished from the commission staff.

Senator LA FOLLETTE. You mean higher authorities in the valuation staff?

Mr. COMMONS. Yes, sir.

Senator LA FOLLETTE. And ultimately, perhaps, the commission itself?

Mr. COMMONS. Yes, sir. There should be on the part of the companies an appeal to the commission on points on which there is no agreement reached, or even if there is an agreement reached the commission should know upon what basis or principals the agreement was reached. The commission's staff would evidently have to be protected against any form of collusion with the staff of the corporations. That is doubtless recognized, and it certainly ought to be, because with such enormous interests at stake the commission would have to organize its staff and have the system of supervision and inspection which would guarantee that there would be no improper relationship. Yet there must be a relationship—a close and intimate relationship—during the progress of the inventory and the fixing of these details between the staff of the commission and the staff of the railroad. I do not see how any authority can organize a staff of that purpose—for valuation—except the Interstate Commerce Commission itself. Whether it should organize it in the form of a board, or whether it should organize it on the principle of making one man responsible to the commission and let him select these subordinates, that is something that the commission should work out itself. The bill, as I take it, leaves that matter entirely open. It permits the commission to select experts and assistants, and then provides for examiners, etc. In the course of its activity it might want to change its organization, bring in different methods, and only experience can determine how this should be done.

The question of procedure follows naturally from the question of the problem of valuation, from the part that the staff plays—I mean the valuation staff—as against the part which the commission itself plays in arriving at the final result. Possibly there ought to be terms introduced in addition to what are proposed to take care of that situation.

I would suggest that the designation 'preliminary valuation' should be used to describe the work done by the staff—that work which is supposed to be submitted

annually to Congress and published when completed. When this staff of valuers has completed its work, or has simply presented a number of different elements of value, those could be summed up in a great variety of totals. You take the total of all the elements, whether they are consistent or not, and you might have one enormous total. You take another total, after weighing the different elements, and you might have a different one. It is not the province of his staff of valuers to give weight to these different elements. That is the province of the commission, but the commission can not give final weight until it has heard all parties and has heard the arguments upon the proper assembling of those elements to produce a final total.

But, at the same time, it is necessary to get a tentative total for the parties to the suit. So it would be necessary when a case arises involving the valuation—and I think those cases would not arise under cases of discrimination, but would only arise when there was a proposition to have a horizontal increase or a horizontal decrease of rates as a whole—it would be under such conditions as that the question of valuation would come in. In the case of any particular rate it would not come in unless that particular rate is proposed to be reduced so greatly that it would infringe upon the total income of the company so as to bring the total income below a reasonable income. The question would come up in that class of cases, and with reference to the final determination of that case the commission would have to send out, with its notices, its own tentative valuation, which would be different from the preliminary valuations in that it would be a summing up tentatively by the commission of those elements according to its best judgment at that time, so as to produce a tentative total. The other term used here is 'final valuation,' which would be the one coming last after the full investigation and determination.

Senator LA FOLLETTE. Do you mean a tentative reasonable total?

Mr. COMMONS. It would necessarily be the tentative, reasonable total. These preliminary valuations would also have to be made with reference to the reasonable results which are to be obtained. It is the tentative valuation which has not yet become reasonable because it has not gone through the legal procedure of hearings and arguments and final determination by the commission. Under the scheme proposed, where this staff of valuers is to start at once and begin to make these valuations, and these valuations are to be published in the course of the proceedings for valuing, they should, perhaps, be given out, not as a total but as the elements, whatever they may be.

This would involve an interval between the publication of the staff's preliminary valuations and the arising of a case when the commission would give out its tentative total, supported by those preliminaries, and brought down to date by its accounting system. In that interval these preliminary valuations would be open to the public for public discussion and the public generally would be attracted to the problem, and we might expect that the country as a whole would become educated as to this question. It certainly is not a question that can be worked out in the confidences of experts. It is a question that, while it is finally decided by the Supreme Court, yet it can be decided in view of the prevailing discussion which has been carried on and the stage which the country has reached in its judgment on those elements.

I think that is all I have to say.

Senator LA FOLLETTE. Would it not be better, Mr. Chairman, for Mr. Commons to take the two bills with the suggestions suggested by the representatives of the railroads and discuss them and the bill submitted by the subcommittee and discuss these provisions, if he has anything further to say about them, and then submit himself to questions by the committee?

The CHAIRMAN. I think, if he is not through, it is better for him to complete his statement. I understood him to say that he had finished.

Senator LA FOLLETTE. In talking the matter over with him, I assumed that he would go over these suggestions submitted by the railroads, but if you prefer to interrogate him now generally, that is agreeable to me.

Senator LIPPITT. He has discussed the principles very generally, and while those are fresh in our minds it might be well to ask him questions regarding them. There are just one or two questions that personally I would like to ask him.

The CHAIRMAN. Senator Cummins, do you desire to ask any questions?

Senator CUMMINS. At the very outset I desire to express my appreciation of the very valuable contribution which Prof. Commons has made to this subject. In the questions I shall ask I may deal with the general subject rather than with the details of this bill. You are aware, Professor, that there are a great many people who feel that if a certain theory which you have mentioned more than once, of values, be finally adopted, that the result will be a valuation greatly in excess of the capitalization of railway property, are you not?

Mr. COMMONS. Well, I think that would depend upon the particular cases as they arise. Do you mean to take all the railroads as a whole?

Senator CUMMINS. No; I am asking you only whether there is not that theory in the minds of a great many people.

Mr. COMMONS. I presume there is. I am told by railroad people that they feel confident they will come out better than the public in this valuation problem.

Senator CUMMINS. That is what I asked you, if there was not some apprehension about the outcome of valuations, if certain theories of value which have been proposed from time to time by the courts and by advocates as well, shall be adopted, and it is concerning that that I particularly want to inquire. The real difference between property which is devoted to a use in a service of the character you have been describing and ordinary private property is that the former may only earn a fair and reasonable return upon the value, whatever that may be, and in the latter the owner is permitted to earn any profits that he may under the laws of commerce and trade. That is the real difference, is it not?

Mr. COMMONS. Yes, sir.

Senator CUMMINS. And that difference, of course, is due, first, to the character of the service and the dependence of the public, and secondly, to the powers and privileges that are given to those who render that service in the acquisition and the use of their property. Now, bearing that in mind, I want to put to you this illustration, which of course could never occur in actual affairs, but which I think will serve to explain what I have in mind. Suppose that a railroad company were to build a line of railroad into which it would put a million dollars, and that when completed it began its service to the public, and before it began this service the Government undertook to fix the rate or rates to be charged for the service. Suppose that the Government were successful so that it correctly fixed the rate in sums that would maintain the property in as good condition as when the operation began, pay all the cost of operation and of depreciation, and return 6 per cent upon the amount which the property originally cost, and we will assume that 6 per cent is a fair and reasonable return upon the property devoted to that service; the business of the company continued the same without variation; the rates continued the same, the cost of operation continued the same, but in the course of 10, 15, or 25 years, the value of the property surrounding the railway right of way and terminals had so increased that it was worth twice as much as when originally acquired by the railroad company, that is, twice as much for some other purpose than a railway purpose, do you believe that under those circumstances the rates ought to be increased so as to return an interest or reward upon a larger sum than was originally represented in the property?

Mr. COMMONS. My own idea is that if the case were properly presented to the court the court would adhere to the idea of reasonableness throughout, and would recognize that, for rate-fixing purposes, this property, being devoted to a public use, was entitled only to a return on the actual reasonable investment cost of the property. They might take a different view if the railroad was dismantled, thrown out of exist-

ence, or displaced, or where the railroad changed its right of way to some other place. The value of the property then for sale, or their title to it, might be entirely different—

Senator CUMMINS. Yes.

Mr. COMMONS. Than the value of the property for rate-fixing purposes, because it would then be necessary to go in and see what title they had to the property.

Senator CUMMINS. You realize, as I said in the beginning, that I was only inquiring for rate-fixing purposes?

Mr. COMMONS. Then, I can say that it would be necessary to go into the original cost to find what was the true investment on that basis; and the fact that the State had given the privilege of eminent domain in order that they might get a straight line is quite similar to the fact when a city gives them corporation privileges through the streets. Public property, public sovereign power, is given to the corporation, and whatever springs from that would not be entitled to a charge being made—a charge for private purposes against the public.

Senator CUMMINS. Would not that be due to this reason: That the company was earning a fair return upon its property as originally constituted, and that the property used by it and devoted to the service of the public was therefore worth no more for railway purposes than when it was originally put into the service?

Mr. COMMONS. Of course you understand that during this time it had its fair return on that property.

Senator CUMMINS. All the time; yes.

Mr. COMMONS. If there was any, for instance, below a fair return, either in the earlier stages of the corporation or any such, there must have then been another period when there was a surplus that made that up. So you are assuming that there was an average reasonable rate of return through the entire period of the history of the corporation.

Senator CUMMINS. The reason you have just suggested would be explained by the fact that if during a part of the period of operation the railway company had failed to return interest upon the value of the property as ascertained the extent of that period would really become a part of the cost of the property?

Mr. COMMONS. That is my view of it.

Senator CUMMINS. What I have said with regard to the real property—the right of way and terminals—would also be true of the personal property or the increment under those conditions, would it not; that is, suppose a company had a box car that cost \$800, as good as new? The day it was put in service, however, by some revolution in business it would cost twice that much to get another box car, and it would get another one at twice the cost of the first one. The value of the first box car for the use to which it was put would not be increased at all, would it?

Mr. COMMONS. It would be diminished; it would depreciate, I should think.

Senator CUMMINS. I am assuming that you consider it so early after its manufacture that it is good as new?

Mr. COMMONS. Yes.

Senator CUMMINS. But the mere fact that other box cars, if purchased, would cost more, would not increase in any way the value of the box car that had cost \$800, would it, for the service of the company and the service of the public?

Mr. COMMONS. That is fully cared for—items of that kind—in a proper analysis of depreciation. Depreciation arises from various causes, not merely from wear and tear—physical depreciation, but through obsolescence or inadequacy where it is not up to date as compared with other equipment. Now, as to that other equipment, the company should not be penalized by a low allowance, so that it could not be in a position to adopt new and more expensive equipment when that is found available. The obsolescence element, or depreciation through obsolescence—or perhaps, what we

might better say, through the introduction of competitive or alternative improvements, is an important thing.

Senator CUMMINS. I do not think you quite understand my question. I will put it in another way, so that it will be clear to me, at least. Suppose that a railroad company should enter into a contract to purchase 100 box cars at \$800 each, and the week after that entered into contract for the purchase of 100 more at \$1,600—

Senator TOWNSEND. The same car?

Senator CUMMINS. The same kind of cars, and would have to pay \$1,600 for them on account of some violent disturbance of the market for such things. Assume that they were all delivered to the railroad company at the same time, and then at the moment of delivery you should come in to value those box cars, how would you value the 100 that were bought at \$800 as compared with the 100 that were bought at \$1,600 each?

Mr. COMMONS. If the company did not need those 800 at all for its work, it would probably sell them.

Senator CUMMINS. But I am assuming that they were all needed, and the only difference between them is that one lot cost \$800 each and the other lot \$1,600 each, but otherwise they were exactly alike and all put into the service and all needed in the service.

Mr. COMMONS. I think if it should be shown that they were all needed in the service—and there was no other question except that one involved—that they would certainly be entitled to capitalize them for their cost for railway purposes. They might not be as efficient as the others; the cost of the operation of them might be greater and there are other questions which would have to be taken into account in determining what was the reasonable value to give to them. But narrowing it down to just the one proposition, as you say, if they are used and useful for the convenience of the public, and they are actually used, and a part of the necessary equipment to carry on the business of the company, they are certainly entitled to the value placed on them.

Senator CUMMINS. They are entitled, but the company would not be entitled to a value of \$1,600 upon those cars for which it had paid only \$800?

Mr. COMMONS. No; I spoke of cost value; what it cost them. It has 100 cars which cost \$800, and another 100 that cost \$1,600. The \$800 cars do not appreciate—

Senator CUMMINS. That is just what I was trying to get at.

Mr. COMMONS. When they pay \$1,600, because the \$1,600 is a better car; it is an improved and better car. They had to pay \$1,600 for it and they only had to pay \$800 for the others. Their true investment in the one case would be \$800—

Senator LA FOLLETTE. I do not understand, Professor, that Senator Cummins question involves any question of improvement at all.

Senator CUMMINS. Not at all.

Senator LA FOLLETTE. It is supposing the cars were identical, and owing to some violent rise in prices, due, perhaps, to destruction of material, out of which they are built, or something of that sort, the company actually has to pay twice as much for the second purchase of box cars as it paid for the first. Would the fact that the price of those cars had advanced in the meantime in value, advance the price or advance the cost which would be returned in getting the original cost of the cars that were bought at the lesser price?

Mr. COMMONS. I should think the same reasoning or rule would apply if they had bought another hundred cars at half the price—\$400. What would be the reasonable value at the time of the purchase to give to the cars would be the price which they had actually paid for the cars, including the total price. If it was \$800 it would be \$800, and if it was \$400 it would be \$400, and if it was \$1,600 it would be that.

Senator CUMMINS. Then, assuming a condition of adequate return upon cost, there is no such thing in the proper valuations of public-utility property as appreciation, is there?

Mr. COMMONS. There is no such thing in it as an appreciation that has not cost something. If you had an appreciation which had cost something to get——

Senator LA FOLLETTE. The original cost is for the purpose of ascertaining exactly what was paid.

Senator CUMMINS. And having reached that point, how would you express in this bill the requirement that among other theories, or kinds of value, the valuers should ascertain the value of all the railway property for railway purposes? Is what I have stated a good form of expression, or is there some better one?

Mr. COMMONS. That brings up the question of the wording of one of these sections, which I think could be improved. If you will allow me I will make a suggestion later which I have in mind on that point.

Senator CUMMINS. I now turn to the practical operation of the bill with respect to preliminary or tentative valuations, and permanent or fixed valuations. In your reference to that part of the subject did you mean that the subordinate body created by the commission should make preliminary valuations upon these several bases or theories, and make a report to Congress or to the Commission, and that then the matter should rest there until the occasion arose in which that information was to be used? Do you mean that if this information is all collected and report made, that it shall be in such form and shall have such effect as that if a case arose before the commission in which the value of a particular railway property would become material, either side of the controversy could take such parts of this information as it thought would serve its object and offer that information in evidence before the commission? That then the commission for the first time should be called upon to determine permanently the weight that should be given to each item, or each classification, and which of the various classes should be accepted? I could not quite gather that.

Mr. COMMONS. I am not quite clear as to how that should be done. I would not allow a total to be made by this subordinate staff which involves the assembling and the judgment which shall be passed upon the weight of the various items which they have compiled. Their work, however, must be reviewed in a public hearing. Whatever evidence is collected by them and published has no weight whatever as prima facie evidence in any proceedings. It is simply the work of a subordinate staff of experts.

There will be two things that will have to come up in the hearing. One is as to the actual details of those various findings or results which the staff has arrived at, and the commission will have to decide upon those. They must be subject to public hearing and argument. And then, in addition to that, there will be the assembling of those totals to constitute a whole, the reasonable value of the property as a whole at the present time. That also will be a matter of argument mainly, and the commission would have to listen to arguments on that question. Whether or not in addition to the argument in that public hearing the commission should proceed itself to assemble this in a tentative way as a whole, and thus send that tentative summary out as its probable view of the value as a total, analyzed, of course, with these elements which it has given weight to, thus anticipating its final opinion, or whether it should send them out in just the form that the staff had determined, and thus leave the question of what is to be the total value entirely in the air, I am not entirely clear.

Senator CUMMINS. Let us suppose this situation, that the valuers—whatever name they may bear—have taken the Chicago & North Western Railway Co., for illustration. They have found the value first, of the stock and bonds or capitalization. Second, the cost of reproduction, less depreciation. Third,

the original cost up to date. Fourth, the value of land and terminals, ascertained by reference to the value of adjacent property used for other purposes; and, fifth, the value for purposes of common carriers. Is it your idea that if a case were to come up before the commission in which the commission was trying to ascertain whether rates or proposed rates of the railroad company were reasonable, that either the railway company or shippers, or whoever were on the other side, could go to that valuation and take from it whatever information they thought was material and offer it before the commission?

Mr. COMMONS. Yes, sir.

Senator CUMMINS. And that, then, for the first time, the commission would be called upon to assemble these various things and express an opinion upon the real value of the property?

Mr. COMMONS. Of course that would be the public hearing and the argument of both sides of the question.

Senator CUMMINS. In that event we would have to give to the preliminary work of these valuers, who are subordinates of the commission, the effect of *prima facie* evidence in a controversy or suit.

Mr. COMMONS. If that is true I would reply differently. I think it would be simply the preliminary work of an unofficial body. The official body is the commission, and it alone can give that value which I understand is *prima facie* the value in the premises.

Senator CUMMINS. We could not very well authorize or give any such conclusion—and all values are conclusions—the effect of evidence in an adversary proceeding until it had been passed on in some form by the commission?

Mr. COMMONS. No; and I should not think it ought to be in the case of a hearing before the commission. The commission comes with open mind, we will say. It has had its values made. The experts have done it to the best of their ability and they have given their tentative valuations purely as experts, but not as representing the State in the case. There is no *prima facie* value except as it carries the weight, the names, and the work of the experts who have conducted it. In that sense it has a certain presumption, but it may be attacked by the railroads, who have under this system been carrying along their valuation at the same time, and have noted all the points of differences in all the details.

Senator TOWNSEND. Or by the commission.

Mr. COMMONS. Or by the commission. The experts must appear before the commission as though they were not employees of the commission, in the sense that it is in a position to go back on the work of these experts, and it subjects its experts to cross-examination by the parties to the controversy, and it decides finally—which may be different from what its experts have decided—on the items as they come through. It would then naturally instruct its experts to recast on the basis of the decision which it makes as the result of the hearing.

Senator CUMMINS. Is it your opinion that ought to be done before the actual controversy or suit arises?

Mr. COMMONS. No; I think that ought not to be done until the suit arises which involves the valuation.

Senator CUMMINS. The suit first comes before the commission itself?

Mr. COMMONS. I take it the suit would come when some petitioner asks for a change in a rate, or one of these petitioners provided for in the interstate commerce law, asking for a general revision of rates, or it would come from a railroad asking for a horizontal increase in rates. When that suit is entered the commission determines that the valuations which have been made two or three years before, and kept up to date, are essential to the case, and while it is hearing the other points that may be brought up, it must enter this testimony, these preliminary figures, as a part of the

case, and then the procedure would follow through exactly as though it were a case of discrimination, or any other case that did not involve the valuation.

Senator CUMMINS. It would simply be in evidence, then, before the commission?

Mr. COMMONS. It would be in evidence before the commission. I have an appointment with an officer of the Interstate Commerce Commission to work out that element, that item of procedure. I am not familiar with the procedure.

Senator CUMMINS. After the commission acted, if a suit were brought in the Commerce Court as it now is, and possibly in some other court, as it may be, to set aside or annul the order of the commission, the valuation as found by the commission would be *prima facie* evidence before that court?

Mr. COMMONS. Yes.

Senator CUMMINS. But ought there not to be some way for either the shipper or the railroad company to bring in the other facts before the court that may have been disregarded by the commission?

Mr. COMMONS. That is what I do not know about—the procedure of the Commerce Court or the court that reviews the action of the Interstate Commerce Commission. The proper way to do that, it seems to me, would be to say that this should be *prima facie* evidence of the value in the case. That if any party brings in any evidence before the court which the commission did not have before it in passing upon the case, the court should refer it back to the commission to take that into account, to establish some new value if they desire. Whether that is the procedure under the Federal law I do not know.

Senator CUMMINS. What bothers me is that, assuming that the commission should adopt a certain theory with regard to the value, and carry it out in its total—the information collected by the valuers, their opinions with regard to values on some other theory, I, as representing a shipper, might want to use, I would have no opportunity to collect all that information independently. There ought to be some way that either the railway company or the shipper could get hold of the initial facts so as to present them to the court or to the commission, as the case might be.

Mr. COMMONS. Is there anything in the present procedure in an appeal or review of the Interstate Commerce Commission's decisions which would keep the Supreme Court from going back into the original value?

Senator CUMMINS. It would have to come back as material in the court. It would have to come in as testimony taken in a regular way.

Mr. COMMONS. Yes.

Senator CUMMINS. I suppose I could not get in if these valuers had said the value for common carrier purposes was so and so, and the commission had taken another view of it, and I want to bring that into the court. I suppose if nothing but the action of the commission made it *prima facie* evidence, I would not be able to go back and bring in simply from the record the facts upon the other theory. I have not worked it out myself at all, but I wish to suggest these things to you.

Mr. COMMONS. There would be nothing to prevent the court from passing on the weight which the commission had given to the different elements. The court has done so in all cases that have come up from Federal courts or State courts. It goes into the question, for example, of whether depreciation has been properly settled.

Senator CUMMINS. In the cases we have had before the testimony has been introduced in a regular way under the ordinary forms of putting in evidence.

Mr. COMMONS. Do you think, then this provision that it should be *prima facie* evidence in court prevents the court from going into the method by which it was done?

Senator CUMMINS. That is what I am trying to get at. Suppose either the valuers or the commission would find that the value of the Northwestern Railway property was \$100,000,000. Suppose I wanted to question that in the courts, how would

I reach these others—what might be called the items of valuation which the valuers had collected, and on other theories than the one that might be adopted by the commission?

MR. COMMONS. I presume you would simply in your petition to the court make your argument that a certain element should be introduced or rejected.

SENATOR CUMMINS. I should have to prove the fact, and under the rules of the court, in order to prove the fact I would have to call the men themselves who had done the work, and take their testimony. And that, I think, is not the idea.

MR. COMMONS. That is not the intent.

SENATOR CUMMINS. That is not the idea of the bill, is it?

MR. COMMONS. No.

SENATOR CUMMINS. I hope when you are working this out with the commission for any member of it, you will bear that in mind, because it is one that I think is a very important part of an adjustment.

MR. COMMONS. If you will allow me, I shall present later, after a conference with the Interstate Commerce Commission or members of it, a proposed procedure that would meet that and conform as closely as possible to the present procedure.

THE CHAIRMAN. Very well.

SENATOR CUMMINS. That is all.

THE CHAIRMAN. Senator Newlands, have you any inquiries?

SENATOR NEWLANDS. Yes; I have a few. Prof. Commons, are you familiar with the present total market value of the securities of all the railroads of the country?

MR. COMMONS. No, sir.

SENATOR NEWLANDS. A statement was made the other day by Mr. Trumbull, I think, on behalf of the railroads, that the total present valuation was about \$14,000,000,000.

MR. COMMONS. Yes.

SENATOR NEWLANDS. I did not catch whether that was his idea of the value or whether that was simply the market value of all these securities.

SENATOR CUMMINS. I do not think he meant it to be either. I think he meant it to be par values, although I am not sure about that.

SENATOR NEWLANDS. Par values?

SENATOR CUMMINS. I so understood him.

SENATOR LIPPITT. I thought he meant the market value.

SENATOR NEWLANDS. That is the impression I received. He did not so state, but that is the impression I had. And I think that when he stated the total market value—

MR. FAULKNER. Par value.

SENATOR NEWLANDS. Can you tell me what is the total market value of all the securities?

MR. NEWCOMB. There has been no inquiry since about 1907. It was approximately the same as the par values when the commission made the last inquiry.

SENATOR NEWLANDS. Assuming as our base a present valuation, a certain market value of \$14,000,000,000, and pursuing the inquiry to see what the possible effect of the valuation contemplated would be upon the present income of these companies, either in the way of increasing their income, which might be to the disadvantage of the public, or diminishing that income, which would be a disadvantage to the railroads. I should like to ascertain what the limitations, the possible increase or possible diminution, are. Viewing the matter from that standpoint, as I understand it, the railroad consists of rights of way, the structures upon that right of way, the cuts and fills and bridges, the stations, facilities, and sidetracks, the term-

inal facilities, and the equipment. In all those elements where would there be a likelihood of an expansion of valuation? It would be principally, would it not, in the right of way and in the terminals and station facilities? In other words, would there be any probability of a possible increase in the valuation of the fills, the valuation of the cuts, or the valuation of the rails?

Mr. COMMONS. It would depend on whether the courts took one view or a different view. That question, I think, can not be answered until the Supreme Court answers it.

Senator NEWLANDS. I am now defining the limitations, if possible—expansion or contraction.

Mr. COMMONS. I could not predict what the courts would place as the limit, but this is what, as I judge, would happen as regards these different theories. Your inquiry relates to that?

Senator NEWLANDS. Yes.

Mr. COMMONS. If they took the cost of reproduction new at the present time, then we would have to reconstruct that property at the present prices of labor and material. If that property was actually constructed 15 years ago, its cost of production or construction at that time would have been less than at this time; so that if they took the cost of reproduction new they would give this increase in value, and might possibly—I do not know—exceed those market values which you have mentioned. If they took the view of original cost, traced it back historically and developed it, it would depend upon the level of prices at the time when the construction was made. The cost of reproduction new would give them that amount. On the other hand, the engineers might decide to take the average cost over a period of years, or they might take some middle ground. That would all have to come out for determination as to what would be the proper and just method under all the circumstances.

Senator NEWLANDS. Assuming that the cost of labor itself is higher to-day than it was 15 years ago, we will say, the cost of a given unit of production is really less than it was 15 years ago, is it not? Take, for instance, a cut. Are they not to-day, notwithstanding the increase in cost of labor, grading these cuts at a less cost per cubic yard than they were 15 years ago, owing to improved appliances and machinery?

Mr. COMMONS. It is possible they are. On the assumption that they are, what would be the question?

Senator NEWLANDS. On the assumption that they are there would be no danger of an inflation?

Mr. COMMONS. No.

Senator NEWLANDS. An inflation resulting from this valuation, would there?

Mr. COMMONS. No.

Senator NEWLANDS. That would apply, then, both to the cuts and the fills, would it not?

Mr. COMMONS. Yes.

Senator NEWLANDS. Take the structures—the bridges themselves. Assuming that the cost of the labor is very much in excess to-day of what it was 15 years ago, is not the cost of each unit of such a structure, owing to improvements in methods and in machinery, less than it was 15 years ago?

Mr. COMMONS. It may be.

Senator NEWLANDS. If that is the case, there would be no danger of an expansion, would there?

Mr. COMMONS. We should expect, taking the history of the different standard equipments—I mean such as steel rails or things of that kind—that notwithstanding the increase of labor the price has gone down.

Senator NEWLANDS. The price of the unit of production has gone down, whilst the price of the unit of wage has gone up?

Mr. COMMONS. They might find that the present operating cost was increased, but that the cost of construction was less.

Senator NEWLANDS. I am speaking now simply of the physical property. Take, next, the ties. Doubtless there has been an increase in the cost of ties, owing to the increased cost of lumber. There, I believe, it is admitted that there has been an increase in the cost of each unit. That is not a very considerable item in railroad construction—in valuation of railroads, is it?

Mr. COMMONS. As to those details, I could not really say. I have looked them over, but they are not in my mind now.

Senator NEWLANDS. Next with reference to the rails. Contrasting them with the cost of rails used 15 years ago, is the cost of a ton less or greater?

Mr. COMMONS. I think it has been pretty steady for 15 years, at \$28 a ton.

Senator NEWLANDS. There has been no increase, at all events?

Mr. COMMONS. It is about the same.

Senator NEWLANDS. Prior to that time the cost of rails was greatly in excess of the present cost, was it not?

Mr. COMMONS. It greatly fluctuated, I assume.

Senator NEWLANDS. Yes; and running as high for steel rails as what, taking a range of 30 years?

Mr. COMMONS. I could not say.

Senator NEWLANDS. It has been as high as \$40 or \$50 a ton, has it not?

Mr. COMMONS. I should think, judging from the way other industries have improved, that the price for steel rails was much higher.

Senator NEWLANDS. It is now about \$28. Take the case of the spikes with which the ties are fastened. Do you think there is any danger of marked depreciation in value in those things?

Mr. COMMONS. I do not know, really.

Senator NEWLANDS. The next is the right of way itself. It is claimed that has absolutely increased and that it is to be valued by the present market value of the surrounding property.

Mr. COMMONS. Yes.

Senator NEWLANDS. Most of that property being, of course, farm property, and a very small proportion of it being city property—in mileage. Estimating that the average railway is 100 feet in width, there would be, according to my estimate, about 13 acres in every mile. That would be a length of 400 feet would make about an acre.

Mr. COMMONS. Yes.

Senator NEWLANDS. And '400' into '5,200' would go about 13 times, so that we have 13 acres for every mile. Assuming that that value has increased, that cost almost nothing, that it has increased largely and has reached \$100 per acre, my estimate is that the present valuation of 243,000 miles of right of way would be \$315,000,000. That is about 2 per cent, or a little more than 2 per cent, of the total valuation of the railroads, assuming that they are worth \$14,000,000,000, is it not?

Mr. COMMONS. I shall have to figure that out. I assume that it is.

Senator NEWLANDS. And if it were worth \$200 per acre it would be double that? \$631,000,000 would present the total value of the rights of way?

Mr. COMMONS. Yes.

Senator NEWLANDS. And that is about 4 per cent interest?

Mr. COMMONS. Yes.

Senator NEWLANDS. Four per cent of a valuation of \$14,000,000,000. There is not any probability, therefore, of any very great expansion in that direction, is there?

Mr. COMMONS. Not on those figures.

Senator NEWLANDS. Take the terminals and stations, and I imagine these terminals and stations are, of course, of the greatest value in the very large cities, such as New York. It is stated that the New York terminal recently put in has cost \$100,000,000. Would you expect a very large expansion in the matter of terminals?

Mr. COMMONS. I should think that those bought years ago would have quite an expansion.

Senator NEWLANDS. Do you know what proportion of the total valuation of \$14,000,000,000 consists of terminals?

Mr. COMMONS. No.

Senator NEWLANDS. Has there been any statistics made upon that subject?

Mr. COMMONS. The only thing that I know of is in the case of the Washington Railroad Commission, which has valued for that State the Northern Pacific and a part of the Great Northern. They figured that the differences between the original cost and the cost of reproduction was largely made up of the terminals—the appreciation of the terminals.

Senator NEWLANDS. And what difference did they find there between the cost of the road and the cost of reproduction?

Mr. COMMONS. I should have to speak from memory. As I remember it, I think they found something like this, that the original cost was something like \$75,000,000 and the cost of reproduction new was something like \$100,000,000.

Senator NEWLANDS. A difference of \$25,000,000?

Mr. COMMONS. Yes. That is, as I remember the figures.

Senator NEWLANDS. Was that simply for the railroads in the State of Washington?

Mr. COMMONS. I think probably it was. It was not a Federal investigation, of course.

Senator NEWLANDS. And that was made up mainly of terminals—that increase?

Mr. COMMONS. Yes; mainly of terminals. I might be entirely incorrect about that, because I am speaking from memory, but I know that the statement made was that it was largely owing to the Spokane and Tacoma terminals. I do not know how the Washington commission figured that.

Senator NEWLANDS. Do you know what they valued the right of way there at per acre?

Mr. COMMONS. No; I do not. You will find those figures in this book I referred to—Whittin's book on Public-Service Corporations. You will find a statement which he makes regarding the valuations of the Washington railroad commission.

Senator NEWLANDS. We have considered the right of way and the terminals, the cuts and the fills, and the rails. Is there anything left, now, in the railroad except the equipment?

Mr. COMMONS. The bridges?

Senator NEWLANDS. We considered the bridges.

Mr. COMMONS. I think that covers it all.

Senator NEWLANDS. Are you aware of what proportion of the present valuation of \$14,000,000,000 constitutes the equipment?

Mr. COMMONS. No, sir.

Senator LA FOLLETTE. That valuation of \$14,000,000,000 has no relation to the physical properties at all, has it?

Senator NEWLANDS. No; I simply referred to it as an estimate by one of the representatives of the railroads of the present value of the railroads. One suggestion is based upon the par value of the securities. Another suggestion is based upon the market value of the securities. I do not know which is the fact, but I think, however, it was the market value.

Senator CUMMINS. I think you will find, if you will turn to the report of the Interstate Commerce Commission, that it is based on par value. That was \$17,000,000,000.

Senator LA FOLLETTE. It is something over \$18,000,000,000.

Senator CUMMINS. \$18,000,000,000. Then they reduced it by \$4,000,000,000, or something like that, on account of duplicated securities, making a net amount of about \$14,000,000,000.

Senator NEWLANDS. On the average do you understand that these securities in the market as a rule are much above par?

Senator CUMMINS. Some of them are much above par and some of them are a great deal below.

Senator NEWLANDS. What do you think the average is?

Senator CUMMINS. I do not remember ever to have seen a table which attempted to state the market value of the securities, because a great many of them had no market value in the proper sense. They are not on the exchanges at all.

Mr. COMMONS. There was a report made by a committee of which President Hadley, of Yale University, was the chairman. It included Prof. Meyer, now of the Interstate Commerce Commission. They made a valuation of the railroads in the country as a whole, but it of course had no reference to a physical inventory. It had reference to market values, the stocks and bonds, checked up by the operating income. The capitalization of its earnings is practically what I would consider that valuation to have been. I presume that is where these figures of \$14,000,000,000 come from. I think that is probably what you have reference to.

Senator NEWLANDS. With reference to the equipment, is there any possibility or probability of any appreciation so far as that is concerned?

Mr. COMMONS. I have not followed the prices.

Senator NEWLANDS. There is more likely to be depreciation below cost value than appreciation in equipment, is there not?

Senator TOWNSEND. You are ignoring the fact of a technical development, of increase in engines and cars to meet the needs of the times.

Senator NEWLANDS. I mean each item of equipment.

Mr. COMMONS. I think you would have to get hold of an engineer for some of these questions. I do not pretend to have gone into that, of course, except as a summary.

Senator NEWLANDS. Taking, then, these elements which you have already considered, would you think there was much danger of an appreciation of value, an increase of value above that assumed basis of \$14,000,000,000 by reason of this inquiry?

Mr. COMMONS. Do you mean that the commission would ultimately find the fair value of the properties, the fair value for the rate fixing purposes, was in excess of that?

Senator NEWLANDS. Would you think the probability was that there would be an increase?

Mr. COMMONS. I should have to examine their income account and go into it very much more in detail for the whole country than I have. There are very few States that have gone into the question, and their values have been made on such different principles of value that it is difficult to predict how it would come out. I feel this, however, that if a claim is allowed for these appreciations of terminals and

real estate that it is likely that it would come out fully as high as the \$14,000,000,000 or higher. But I even do not know that, and I should like to see the commission find out.

Of course, in predicting the probable effect of any piece of legislation of this kind a person is at a great disadvantage, because it presumes that he knows in advance what the measure is itself to determine, and I really do not know. My idea is that these elements must be considered when the court requires them to be considered. The bill should be framed up so that the courts can consider them, and then the public and the courts will determine. The main thing, as I see it, is to get a just settlement of this irritating question. One great gain that I think would come out of it would be that legislative attacks on corporations would be greatly mitigated, the uncertainty of investments would be greatly reduced. Ultimately that ought to redound to the public benefit as well as to corporations, because the reasonable rate of profit would be less if there was certainty. It might, instead of being 6 per cent, be 4 per cent, if we establish some system which all would recognize as just, where every investor who puts his money in the property knows that it is not either to be taken away from him by some syndicate or legislated away under the police power. I should think in the course of this investigation, which it seems would take several years, there would be a gradual settlement of values, which would cause many collateral changes in the estimate of what is fair—the profit and other things. As to just what the figure would come out at, it would come out widely different for different railroads, so that to strike an average at this time for 250,000 miles would be very difficult.

Senator NEWLANDS. I agree with you as to the value of this work, both to the public and to the railroads. But I was endeavoring to ascertain within limits the range of swing either in the way of a diminution of that valuation assumed by the railroads themselves of \$14,000,000,000 or its increase. Take the matter of income, to which you refer. The last report shows that the net income of all the railroads of the country, after deducting taxes, was \$776,000,000. That represents about $5\frac{1}{2}$ per cent on \$14,000,000,000. Assuming that the result of this valuation would be that the total valuation would be \$13,000,000,000 instead of \$14,000,000,000, 6 per cent on that would yield pretty nearly the present revenue, would it not?

Mr. COMMONS. Yes, sir.

Senator NEWLANDS. And assuming the valuation was as low as \$11,000,000,000, 7 per cent on that would yield about the same revenue as is now enjoyed by the railroads, would it not?

Mr. COMMONS. Yes, sir.

Senator NEWLANDS. So that in case of a diminished valuation any material reduction in the value of the securities would be absolutely prevented by the maintenance of the present net income, would it not?

Mr. COMMONS. By changing the rate.

Senator NEWLANDS. Yes.

Mr. COMMONS. Considering that 7 per cent was a reasonable rate instead of $5\frac{1}{2}$ per cent at the present time?

Senator NEWLANDS. Yes.

Mr. COMMONS. The determination of a reasonable rate is fundamental and essential to the whole proposition, both by the original cost method and by any other methods.

Senator NEWLANDS. But the maintenance of the present net income upon a valuation of \$11,000,000,000 would mean 7 per cent upon that valuation, and it would mean the maintenance in the stock market of present values of the stocks and bonds, would it not? I am now considering it from the standpoint, you understand, of the stockholders and the bondholders.

Mr. COMMONS. And the credit of the companies.

Senator NEWLANDS. And the credit of the companies, as to whether it would have any serious effect upon that. You have observed that there has been a steady increase in the taxes of these corporations, have you not?

Mr. COMMONS. Yes.

Senator NEWLANDS. In the last 10 years I think from about \$40,000,000 or \$50,000,000 annually to a total now of about \$110,000,000 annually?

Mr. COMMONS. Yes, sir.

Senator NEWLANDS. Would not the effect of the valuation be one of increase in operating expenses of the companies in the way of taxes?

Mr. COMMONS. I can not see the direct connection.

Senator NEWLANDS. Would they not be likely to take the valuation of the commission as a basis not only for rates but for taxes?

Assuming that the average rate of taxes throughout the United States is $1\frac{1}{2}$ per cent, and that the usual rule is about two-thirds of the value, and assuming that the valuation should be put under this investigation approximately where it is now placed by the railroads, namely, \$14,000,000,000, it would mean, applying the two-thirds rule, that the total taxes paid by all the railroads of the country would be $1\frac{1}{2}$ per cent on about \$9,000,000,000, would it not—or a little over \$9,000,000,000?

Mr. COMMONS. Yes. You think that would follow from a valuation of this character?

Senator NEWLANDS. Yes.

Mr. COMMONS. It would follow independent of that, and even prior to it, if the States adopt the stock and bond method of valuing the properties. If the stocks and bonds are worth \$14,000,000,000 and the State should adopt the ad valorem method of taxation and were to assess these properties as a unit, they would disregard the physical value and take the market value. That is what has happened, and it has been done quite earlier than its physical valuation.

Senator NEWLANDS. So that there is a decided movement already in the line of increasing the assessment basis of the railroads for the purposes of taxation.

Mr. COMMONS. And that may account for that increase you mention in the tax burden. The States have generally, since the decision in 1890, more and more adopted the ad valorem method instead of the inventory of physical property.

Senator NEWLANDS. In taking the market value of the stocks and bonds as the basis of the assessment, do they take simply a percentage of that value, say, two-thirds, or do they take the whole?

Mr. COMMONS. It depends on what their idea of the rate of tax is. They usually try to find out what other property is assessed at in the State, whether it is on the total valuation or two-thirds valuation or one-third, and they use that proportion for the value of the stocks and bonds.

Senator NEWLANDS. Ah, I see.

Mr. COMMONS. Then they try to ascertain what is the average rate of taxation in the State for all purposes, and take this particular property out of the local taxing district and assess it by a State commission at the average rate at which other property in the State is assessed. That is one method.

Senator NEWLANDS. Yes.

Mr. COMMONS. And that probably is as reasonable and rational a method as could be obtained.

Senator NEWLANDS. Then, I assume that in most cases they do not estimate this percentage upon the market value of the stocks and bonds, but upon a certain per-

centage of that market value, that being the average percentage imposed by the assessment upon all property in the State?

Mr. COMMONS. Yes, sir; that is it.

Senator NEWLANDS. From the railroad standpoint, then, the changes which they have to encounter are an increase in taxation and increase in the operating expenses and wages?

Mr. COMMONS. Those are independent of this matter.

Senator NEWLANDS. Yes; they are entirely independent of this matter; and you think that that tendency toward an increase of taxation is manifest anyway, and it would not necessarily be increased by this inquiry.

Mr. COMMONS. Not at all. I see no connection.

Senator NEWLANDS. You see that, assuming that the valuation here is, say, \$14,000,000,000, and that the average percentage assessed is two-thirds of that or, say, a little over \$9,000,000,000, and that the average rate of taxation is $1\frac{1}{2}$ per cent, including State, county, and municipal taxes, that would mean an increase in the present tax burdens of the railroads, from about \$110,000,000 to about \$135,000,000, or \$140,000,000?

Mr. COMMONS. Possibly. I do not know.

Senator NEWLANDS. Then, I judge from this that there is no reason for apprehension either on the part of the public or upon the part of the corporations of any injurious readjustment, but it has the benefit of reducing the whole thing to a business certainty and of establishing relations between the railroads and the public that will diminish the political activity against them.

Mr. COMMONS. I can not recall any corporation that has been regulated, either municipally or by the State on this basis, that has suffered materially. If they have suffered in one direction they will make very substantial gains in the other direction in the course of time. Of course it takes time to work this out, and if there is to be any change in valuations it would come gradually, not in such a way as to affect one or the other materially. It would be commuted over a period of time, and those broader considerations are involved in this proposition, the main thing being that some certainty is derived in these relations.

Senator NEWLANDS. I will just ask you one more question. I will ask you whether you are familiar with the rule that prevails in Wisconsin with reference to the regulation of public utilities, as to the amount of interest that was regarded as a fair return upon the different classes of public utilities, such as gas companies, electric companies, street railway companies, and steam railway companies?

Mr. COMMONS. There is no fixed rate that they allow, as I understand it, for any one class over the State. In general there is a difference between classes of property which are still in the speculative and experimental stage, like electric properties, water powers, and in which a higher rate would be perhaps allowed, and the other extreme in the case of water companies which are of long standing and secure income. There the rate is lower. In general it depends upon the certainty of the industry as to the difference. There may be other elements.

Senator NEWLANDS. Take a great railway enterprise at its inception; the disposition would be to allow a higher percentage upon the early investments than upon the later investments.

Mr. COMMONS. That they decidedly take into account. I am not speaking definitely regarding a railroad corporation. I have in mind the smaller municipal undertakings.

Senator NEWLANDS. Where there is a certain degree of speculative danger the rate is higher, and then later on as the enterprise becomes assured, a smaller rate of interest is allowed upon the subsequent investments?

Mr. COMMONS. Yes, substantially that is the case. It may not always appear because it may be that the bonds are sold at a discount in the earlier days, but taking the history of the properties that fact is allowed for.

Senator NEWLANDS. Take the State of Wisconsin. Have you had to value the taxation of railways for rate-fixing purposes?

Mr. COMMONS. Yes; that preceded by two years, I think, the valuation rate. The tax commission was created four years before the railway commission. It proceeded on the stock and bond and net income methods, and partly on the physical valuation methods.

Senator NEWLANDS. Taking a valuation by that method, did it vary materially from the valuation ascertained under the method pursued regarding rate-fixing?

Mr. COMMONS. I have in mind the first large valuation that was made. I think of the properties of the St. Paul Railroad in Wisconsin. The tax commission placed a value of about \$62,000,000 on the property, and the railroad commission of about \$60,000,000 on the same property at the same time. I could verify that for you, but I think that is substantially so.

Senator NEWLANDS. Do you remember what tax they imposed for taxation purposes?

Mr. COMMONS. It is the average rate, but it would not at all reach that rate which you mentioned of $1\frac{1}{2}$ per cent. The average rate in the State is not at all that amount. It is possibly 1 per cent. I am not certain what it is or what it was when that valuation was imposed. Of course in fixing that average rate—

Senator NEWLANDS. You have got the property of Wisconsin up to a fair taxable value, have you not?

Mr. COMMONS. Yes; the same commission equalized values all over the State as well as it could, bringing them up.

Senator NEWLANDS. You are aware that in some of the States the assessment is quite below the real value, and in such States the rate of taxation is much higher?

Mr. COMMONS. Oh, yes.

Senator NEWLANDS. My assumption of $1\frac{1}{2}$ per cent covered all taxes, both State and Municipal.

Mr. COMMONS. Yes, sir. There are localities in Wisconsin where the rate is 2 or 3 per cent, because the property is greatly undervalued. But that is corrected, or is being corrected.

The CHAIRMAN. The committee will now take a recess until 2.30 o'clock p. m. Thereupon, at 1.15 o'clock p.m., the committee took a recess until 2.30 o'clock p. m.

AFTER RECESS.

The committee reconvened, pursuant to the taking of recess, at 2.30 o'clock p. m.

The CHAIRMAN. Senator Lippitt, the witness is with you.

STATEMENT OF JOHN R. COMMONS—Continued.

Senator LIPPITT. Professor, there are several things on which I would like to have you clarify my mind a little bit. In the bill as it was originally offered in the House there is an expression 'present values,' as one of the values that should be obtained in making an inventory.

What would you understand to be the method of ascertaining 'present value'—that is, the basis on which it would be obtained?

Senator LA FOLLETTE. Subdivision 2, is it?

Mr COMMONS. Do you mean cost or present value to the owner?

Senator LIPPITT. Perhaps that expression was not in the original House bill, but in the testimony of Mr.—

Senator LA FOLLETTE. (interposing). Cost and value to the present owner?

Mr. COMMONS. To the present owner; yes.

Senator LIPPITT. In the testimony of Mr. Bemis I asked him some questions in regard to present value, and he thought what was meant by that phrase would be valuable information to obtain in this investigation. I want to know how you would consider anybody would go to work to obtain the present value, or what you think the words 'present value' mean.

Mr. COMMONS. I have a note here of your suggestion:

The commission shall in like manner ascertain and report separately the present value and other values and elements of value.

Senator LIPPITT. That is one place where it was suggested to be put in. It was also suggested that it might be put in at lines 22 and 23 on page 4.

Mr. COMMONS. Yes; I have it there, too.

I should say that the term 'present value' does not differ from the term 'value.' It is always the present value as of the date of fixing it. Then you have to define it with reference, I think, to the two very opposite ideas in mind with reference to present value or value. If you should say, 'The present value of the stocks and bonds of the company,' then that would define precisely what you mean. If you would say, 'The present'—

Senator LIPPITT (interposing). That would define precisely in one place what somebody might mean—

Mr. COMMONS (interposing). My point is not necessarily what you mean, but it would give a definiteness which does not exist in the term 'present value.' You could ask the commission to determine the 'present value based upon the market value of its stocks and bonds and its expected income.' If that is what would be meant by it, it would be a value based upon the continuance of the present rates, the future certainty or uncertainty of those rates, and their duration. That is probably what would usually be meant by 'present value.'

Senator LIPPITT. Would it not also include, in making up a figure that would be one of present value, the cost of reproduction?

Mr. COMMONS. If that is so, then I would define it and I would say: 'The present value as determined by the true investment in the past'—not the future; or 'The true cost of production up to date, or the original cost.'

My idea would be that that would be ascertained—

Senator LIPPITT (interposing). May I interrupt you right there?

Mr. COMMONS. Yes.

Senator LIPPITT. Would you, in considering present value, take into consideration the original cost at all? Has original cost anything in the slightest degree to do with present value?

Mr. COMMONS. It does not have anything to do with present value, looked upon as a title to the property that will earn an income in the future. But that is exactly the point I make, that when you define 'present value' as an anticipation of future income, you are introducing the very idea which can not be used in rate fixing; but if you use 'present value' as based upon a study of the property in order to arrive at the accrual in the past, up to the present time, of any deficits, then I would say that you have a present value for rate-fixing purposes. It would have to be defined either as a present value for taxation purposes or a present value for rate-fixing purposes, and my idea is that already full provision has been made for all of those elements that are brought into consideration.

Senator LIPPITT. You would recognize a distinction between cost and value as of to-day, or what we might call present value, would you not, as the term is ordinarily used in regard to property? Whether the property had cost \$100,000 or \$200,000 would have nothing to do with the value of it as of to-day. It might have been acquired very cheaply or at a very high rate, and its value to-day would be a distinct feature upon which cost had no bearing?

Mr. COMMONS. Yes. That is simply because it is a value based on the future rather than on the past.

Senator LIPPITT. Would you say that it was a value based on the future, except in a very unimportant degree? Is not present value the value as it is, as of conditions that exist to-day, and not as they might have existed in the past, nor as one may imagine they are going to exist in the future?

Mr. COMMONS. On the assumption that these conditions will continue in the future; all of them as they are now; yes. There is a certain income that it has had during the past year. We project that into the future, but if it should be known at the present time that that property would disappear a year from now, or that the franchises should disappear a year from now, its present value would be very different from what it would be if we knew it was to continue perpetually; so you have to take into account, in ascertaining present value in that sense, and you have to assume in your mind that the present conditions will continue in the future.

Senator LIPPITT. That is, if the instructions were given in this bill to the commission to obtain the present value of these properties they would, of course, understand that meant the reasonable present values, I presume, and that those reasonable present values would have to be obtained by taking into consideration the possibility or the probability of a continuance of existing conditions; would have to take into consideration the actual existing conditions as regards ability to earn a profit, to be run successfully, and would have to take into consideration the cost of reproduction; and the ultimate figure that they would arrive at would be a reasonable consideration of those three elements.

Is that about your idea?

Mr. COMMONS. It appears to me you have included there the past history of the property.

Senator LIPPITT. If I did include it, I did not intend to.

Mr. COMMONS. In ascertaining or predicting the future income there would be included, besides future operating expenses, future maintenance and renewals and certain fixed charges.

Senator LIPPITT. Those are all included in the expression I used 'for the future.'

Mr. COMMONS. For the future; yes. Then you would have to include also the gross revenue from operation. The difference between those two future elements, one being the element of expense and the other income, constitute your net income. That future expected net income is represented by the present value of the titles to the property, which entitle the owner to the income as it matures; so that the present value involves, as ordinarily understood and as actually practised, when we get down to a legal and economic basis, the anticipation of the future net income.

Senator LIPPITT. As a part of the element that would make up the present value?

Mr. COMMONS. Yes.

Senator LIPPITT. But not as the sole element that would make up the value?

Mr. COMMONS. No; there might be many other elements. The property might be bought and paid for in excess of its earning power, owing to a control which it gives incidental to other properties and making up the value of the other properties. There might be other things that would enter into it.

Senator LIPPITT. I am trying to convey the idea that the price or cost of the property would have nothing to do with its present value.

Mr. COMMONS. That is true.

Senator LIPPITT. So that whatever may or may not have been paid for it, whether in excess of a fair valuation, would have nothing to do with its present value?

Mr. COMMONS. Except in furnishing data to indicate what would be present value.

Senator LIPPITT. If we should use an expression requiring the commission to get the present value for the property would it not be sufficiently definite and technical so that they would reasonably be expected to know what was meant?

Mr. COMMONS. I think that is provided for in a way—

Senator LIPPITT (interposing). I am just asking whether in case it was done that would be a definite expression?

Mr. COMMONS. No; not for rate-fixing purposes.

Senator LIPPITT. I have not said a word about rate-fixing purposes. I am simply asking whether in case we ask them to get the present value of property that would not be technically a sufficiently definite expression so that the commission would understand what figure was reasonably wanted and what methods they would reasonably expect to use in order to obtain it.

Mr. COMMONS. I should think, in the popular meaning of the method, it would be; but I doubt whether it should not be more accurately defined. In order to distinguish it from these other elements that are included here, I should rather go back to the way it is defined in the Smythe-Ames case. That would be a definite thing the people would know about.

Senator LIPPITT. Do you remember how it was defined in the Smythe-Ames case?

Mr. COMMONS. As I said, the market values of the stocks and bonds.

Senator LIPPITT. Would not you think that 'present value' was a much broader expression than simply 'market value,' because market value is simply the sale ability of that property on some particular day. But I have tried to suggest that present value included not merely what you may call the market value at the time, but also included the cost of reproduction at that time; and that the result would be, in the hands of reasonable men, a reasonable modification of those elements; that is to say, are 'present value' and 'market value' two different terms to your mind?

Mr. COMMONS. Yes; I would not say they are essentially the same because if based upon the present reasonable value, it is intended the commission would try to eliminate fluctuations and try to get a present value based upon that average, probably.

Senator LIPPITT. The reason I was asking the question I have, Professor, is because it had seemed to me that the words used in lines 21, 22, 23, and 24, on page 4, left out some of the elements of value that ought to be included in the valuation of these properties, and I was trying to make up my mind whether I was correct or not in that supposition.

Mr. COMMONS. I would not think at all that lines 22, 23, and 24 would exhaust the elements which the commission might determine should be considered. I think that it is necessary to include a general statement that the commission shall, in like manner, ascertain and report other values, if any—

Senator LIPPITT (interposing). If I may stop you right there, if the commission is to report other values, and there are other important values, it would seem to me in as important a bill as this, it would be very wise for us to try to indicate what other values we had in mind, and that there were important values not covered by those definitions in lines 21, 22, and 23.

Mr. COMMONS. Of course, it goes on to say:

And an analysis of the methods of valuation employed.

Senator LIPPITT. That is simply a description of the way in which they obtain the results.

Mr. COMMONS. Then it says:

And of the reasons for any differences between any such value and each of the foregoing cost values.

Senator LIPPITT. Those are descriptions of the way in which they get results.

Leaving that subject, as I understood in your direct testimony referring to sufficiency of income in early stages of production of the property, you thought that such deficiency was an element that should be taken into consideration and allowed for in arriving at the value of the railroad property for rate-making purposes?

Mr. COMMONS. On the original cost theory; yes.

Senator LIPPITT. On the original cost theory?

Mr. COMMONS. Yes.

Senator LIPPITT. So that if anybody had built a railroad and made an error in the value that it was going to be to the community, and that instead of being self-supporting—for a certain period of years or some period of years it was not self-supporting—you think that the public ought to be obliged to pay for that misjudgment?

Mr. COMMONS. That is a question certainly for the commission and the courts to enter into, and the court always has done so. If you will consult the Stanislaus case, which was one of the first cases that came up, you will find the question of mistaken judgment was not allowed to be capitalized in that particular case as against the public for future rate-making purposes. They evidently went into the merits of the circumstances and of the expenditures made, and the company was not permitted to capitalize that which did not represent the reasonable expenditure which ordinary business management would have determined was necessary.

There is, in the starting of every business, a normal period of deficient income, and that is one of the questions which the courts and the commission would inquire into and ascertain.

Senator LIPPITT. Then you mean, by what you testified to in your direct examination in regard to an allowance for deficiency of earnings, that that should be only allowed where, on examination, it was found to be a reasonable and ordinary part of the process of establishing a going railroad?

Mr. COMMONS. Practically, that is the idea.

Senator LIPPITT. You did not mean it was to include anything that could reasonably be secured as the result of misjudgment or too enthusiastic ideas about the necessity of the enterprise?

Mr. COMMONS. That is correct.

Senator LIPPITT. On the other hand, you said that invested earnings—I do not think you used that phrase exactly, but you said that if earnings had been put back into the property the value that was represented by those earnings should not be considered for rate-making purposes. Did you really mean that?

Mr. COMMONS. I say the net surplus—and I mean by that the balance of any deficits and surpluses. I first determined net deficit as essential to——

Senator LIPPITT (interposing). If I caught your meaning as you went along—I may have been mistaken about it, and that is why I am asking the question now—you said where a road had had unreasonable earnings and part of them had been put back into the property, such property as the road now had that could be traced to that cause should not be a credit to the road as against the public.

I would like to assume the case, to make it definite, of a road that may have earned 25 per cent; that may have paid 10 per cent thereof to their stockholders, and the other 15 per cent was put back into the road in the form of new equipment or additional trackage facilities, or in any other way. Would you say that that road to-day was not entitled to have the property represented by that expenditure given just the same bearing in rate-making purposes as any other part of its property?

Mr. COMMONS. I think that would have to be taken into account.

Senator LIPPITT. If you think that would have to be taken into account, suppose that instead of paying that back into the property they paid it out as dividends.

Mr. COMMONS. Yes; I thoroughly recognize the difficulty of carrying it out.

Senator LIPPITT. Further than that, if they did make those earnings, they made them under conditions that at least tacitly allowed such earnings to be made that they did not approve of; that it was the custom of the business, whenever they were made, that the rates of railroad transportation should be governed by 'what the traffic would bear,' to use a popular expression.

Mr. COMMONS. I am assuming, of course, that the principle of a reasonable rate prevailed even though the investigation had not ascertained it until the State set up the machinery for doing it.

Senator LIPPITT. It occurred to me, in listening to what you said, that you were giving the road too great credit when you said, that it should have an allowance made in its favor for all deficiencies of earning power, and that you were giving it entirely too little credit when you said it should not have credit for surplus earnings that might be put back into the construction of the road; for I can imagine no better way of building a road or extending any business than to have a portion of the earnings put back into the property, instead of accumulating stocks and bonds that would for the future have to have interest or dividends paid upon them.

Senator LA FOLLETTE. It might be done by reducing charges to the consumer and not accumulating so much surplus.

Senator LIPPITT. That is an antecedent condition. I am talking about what would happen with the money that had actually been earned.

Senator LA FOLLETTE. I understood you to say you could not see any better way to manage your business than to conduct it on the plan of accumulating a very large surplus by excessive charges and putting some of the surplus into new construction.

Senator LIPPITT. I did not quite put it that way.

Senator LA FOLLETTE. So far as the public is concerned, the best way would be to reduce the charges.

Senator LIPPITT. I did not quite put it that way. I said I could not imagine any better way of extending a business than to put part of its earnings back. I did not say 'excessive earnings.' I think that many a business enterprise has been ruined by not realizing that growth and development were as necessary a part of the cost of conducting the business as paying the operatives or buying supplies.

Mr. COMMONS. The real proposition is whether it should be capitalized as against the public. I know of a property which was valued in England, a gas company—I was on the commission that valued it—and we found that its physical property inventoried about \$3,000,000 more than the capitalization. That is a place where it was regulated through the regulation of stocks and bonds. They had put surplus earnings back into the property and had thereby increased the operating efficiency of the property, but the capitalization charged had not correspondingly increased. There were no stock dividends, in other words. The result is that that company is selling gas now to the people cheaper than any other company in England. By virtue of taking the people's money and getting this surplus and putting it into the property, they have perhaps done a good thing.

But the real question at issue is whether, having done that, they are entitled to turn around and capitalize it as a claim upon the public for future increases of income. They could never have reduced their rates to the level that they have reached had they kept on capitalizing, by issuing more stock, this particular income which they had secured.

Senator LIPPITT. I should suppose it would scarcely be considered equitable to take any steps now by law which would deprive the people who put that money back

into the property, if the property they had so acquired when at the time they did it they could, with perfect justification, have simply paid it out in dividends, and in that case invested it in a neighboring gas company, in which case nobody would have thought for a moment of depriving them of it.

What I am coming at is that moneys that were earned are just as properly reinvested in the property that has earned them as to be paid out in dividends and used in any other way, and that it shows a care of the property and a desire for its permanence on the part of stockholders to reinvest their money in that way, and that by so doing it is a guarantee to the public that that property is going to be well kept up. I am talking about the past and not about the future.

Mr. COMMONS. And you would think that a company having done that would be entitled to issue stock dividends representing that increased physical property?

Senator LIPPITT. I should think they would be entitled to use that property just exactly as they would any other property which they have obtained.

Senator LA FOLLETTE. Just as they would if they had furnished the capital instead of the public?

Senator LIPPITT. Not at all. They did furnish the capital.

Senator LA FOLLETTE. They did not furnish the capital for this new construction which you admit, by the hypothetical case which you state, was exacted from the public in an accumulated surplus.

Senator LIPPITT. I do not think I agree with that. I think they furnished the capital exactly the same as though that capital had been first paid out in the form of dividends, and then they had been given the opportunity to reinvest it in the form of additional stock.

Senator LA FOLLETTE. That would not make any difference.

Senator LIPPITT. I am talking about that money that had been actually earned under conditions that prevailed at the time it was earned, and instead of being paid out—

Senator LA FOLLETTE. The question is whether it was earned or not.

Senator LIPPITT. I am assuming it was earned, because it was there.

Senator LA FOLLETTE. Because they got it?

Senator LIPPITT. If it can be earned or if it is illegitimately earned, that is a different question that can be gone into; but every statement the professor has made, as I caught it—and that is why I am asking about it—was that invested earnings ought not to be allowed as a credit in making these valuations to the property in which they have been invested, and that was a doctrine that was somewhat in the extreme to me, and I want to get the professor's idea of it.

Mr. COMMONS. There are two points I would like to mention in connection with it. You said I was liberal at first in allowing them to capitalize the deficit—

Senator LIPPITT (interposing). I thought that was too liberal.

Mr. COMMONS. And then you say the second time—

Senator LIPPITT (interposing). I thought it was too liberal, because I think it is the common custom of trade that a man shall be penalized for his errors, his mistakes in judgment, and that he shall be rewarded for his successful judgment. In one case it is the penalty of the absence of profit, or perhaps of the loss of investment, and in the other case he obtains the reward in a larger prosperity and in an enhanced return; and inasmuch as in all businesses and all enterprises that element of risk enters very largely, I think we have to consider it in making up these valuations and to say that where a man has made a mistake in judgment the public is going to compensate him for it, I think, would be a very poor policy to introduce into railroads or any other business, because it is putting a premium on ignorance and on inefficiency.

Mr. COMMONS. On the other hand, if you are going to adopt the doctrine which I suggested of deducting the unearned surpluses, to be just to the railroads you

would need to reduce that surplus by the amount of the deficit they had incurred at the start.

Senator LIPPITT. You are making the National Government in that case a private nurse to the investing public, and when they have been wise and enterprising and efficient you are taking away their reward, but where they have been unwise and inefficient and negligent in business, you are making it up to them, which may be a good policy for the future, but it is not the one that prevailed in the past.

Mr. COMMONS. As to the past, as to the final determination of that question, as I understand it, it is the intention of this bill to present the facts. The final determination as to whether it is just and equitable will be with the Supreme Court of the United States, and we are proposing, or this bill is proposing, to get those facts in such way that the court can pass upon them. While I may have presented this proposition or you may have presented it in a different way, yet I do not see that it controverts the purpose of this bill, which is to get the facts, and if the Government proposes to nurse this business, that is another question. They are nursing it now, and have been nursing it, for they have protected it against the States in matters which they judged would confiscate its properties. The public is asking that it also be protected against the Supreme Court or any property interest that might have been excessive or extortionate.

Senator LIPPITT. You have used the expression here, 'value for rate-making purposes,' and you have implied that some properties which might be in the possession of the railroad ought not to be considered for rate-making purposes. I understand that some of the properties that are included in that idea are properties that are distinctly outside of railroad equipment, such as coal mines and other things of that sort; but I also infer, from the general tenor of what you state, that you think there are some properties the railroads actually have which are used in the daily operation of the railroads and which have been acquired under some form of investment, that you think was not for the public good, that should also be excluded in the making of rates.

Mr. COMMONS. Not as you have stated it, but if you will mention any items I will try to answer the question.

Senator LIPPITT. I had in mind particularly property that had been bought by what we have been discussing—that is, the invested earnings.

Mr. COMMONS. That would be a property which was still used for railroad purposes?

Senator LIPPITT. I so describe it, but that property you state should not be included in the valuation that is to be used for rate making purposes.

Mr. COMMONS. If the balance turns out in the way in which I describe.

I thought you were now turning to the question of whether you should capitalize restaurants and other conveniences. That would be a different question, and the commission and the court would have to determine that question, whether properly something that is annexed to the business is for railway purposes or is securing a profit from other sources.

Senator Lippitt. Will you give me a description of such properties as you think ought not to be included in the valuation for rate-making purposes, not including in that description of them such things as coal mines and properties of that kind?

Mr. COMMONS. Things that are evidently not for railway purposes?

Senator LIPPITT. Yes.

Mr. COMMONS. Office buildings. An office building may be built by a railroad company much larger than its own interests require, and the surplus space may be rented to business concerns. There are evidently two purposes for which that office building is used.

Senator LIPPITT. What other things would you have in mind?

Mr. COMMONS. I would apply similar reasoning to all other things. I would say that anything of that nature should be considered, such as a restaurant or a hotel, for instance. Railroads do not usually run hotels. If railroads do use hotels and they get a profit from the hotel business, that would have to be segregated.

Senator LIPPITT. Suppose there had been a loss from the hotel business?

Mr. COMMONS. If it could be shown that the running of that hotel was necessary, on a showing that private capital had not come in and built the hotel and that the railroad wanted to attract passengers and attract tourists, it should be given due weight.

Senator LIPPITT. You would not exclude a restaurant that was part of a station, as is frequently the case—part of the equipment of a station?

Mr. COMMONS. Of course the income from that restaurant would be merged into the total income of the company as contributing to a fair return.

Senator LIPPITT. But the value of the restaurant as a property—

Mr. COMMONS (interposing). That would be capitalized in that case, if the revenue was also turned in.

Senator LIPPITT. As for railway purposes?

Mr. COMMONS. Yes. The court uses the term 'for the convenience of the public,' and I presume that means rather a broad interpretation of a property which is more than for purely carrier purposes—'for the convenience of the public.'

Senator LIPPITT. Then, as you think of it, whatever kind of forms of property that would be excluded from the valuation by that expression 'for the convenience of the public' or 'for railway purposes,' as you say, would be rather an exceptional form of property?

Mr. COMMONS. In this country, yes.

Senator LA FOLLETTE. That is outside of coal lands?

Senator LIPPITT. Oh, yes.

Mr. COMMONS. That is a question of fact for the commission.

Senator LIPPITT. Senator Cummins stated to you that he thought there were a great many people in this country who feared that these valuations would show valuations of railway property in excess of their capitalization.

Senator CUMMINS. You have not quoted me quite correctly.

Senator LIPPITT. Will you state it?

Senator CUMMINS. If certain theories of values should be adopted.

Senator LIPPITT. In that event, that there were a great many people who feared that?

Senator CUMMINS. Yes.

Senator LIPPITT. You said you thought that was correct, Professor?

Mr. COMMONS. Yes.

Senator LIPPITT. I was going to ask you why these people in large numbers should fear that the value of this property should be larger than they thought it was.

Mr. COMMONS. If the reasonable value is larger than they thought it was, then their clamor is unfounded. If it turns out to be less, then the fears of the corporations are unfounded.

Senator LIPPITT. I had always rather supposed myself the people of this country would rejoice when they found they were richer than they thought they were.

Mr. COMMONS. If they are richer in their own right, yes; but if the enlargement consists in the authority to charge them a price, then they are not rejoicing and are not richer.

Senator LIPPITT. Then the country as a whole should own no property except what is owned by the Government, and the prosperity of the whole is the prosperity of the individual, you think?

Mr. COMMONS. The rates and prices which they pay are deducted from their income in that respect.

Senator LIPPITT. I think that is all I have in mind, Professor. Thank you.

The CHAIRMAN. Senator La Follette, you may proceed.

Senator LAFOLLETTE. Prof. Commons, I understood from your answers to Senator Lippitt that 'present value' taken by itself would not be a safe term to use?

Mr. COMMONS. I should not think so. It ought to be qualified in such way as to be descriptive. There should be a descriptive term.

Senator LAFOLLETTE. And is any other term required in order to enable the commission to ascertain all of the values of railway property which may in any way be considered for the purposes of this bill—provided in the bill itself?

Mr. COMMONS. It seems to me it takes care of everything. It says, first: 'Shall value of the property.' Then it mentions certain items. Then it says: 'Separately other values and elements of value.'

Then it requires the reasons for the differences between these several values and intimates, or makes plain I should think, that it is as comprehensive as any party to a suit would present to the commission to be considered as an element of value, which should be taken into account.

It is consistent, I take it, in the terms used with those which the courts now use and which are recognized.

Senator CUMMINS. I have one or two questions, Mr. Chairman.

Senator LIPPITT. May I ask just one question before you proceed?

Senator CUMMINS. Yes.

Senator LIPPITT. Professor, you said, in your answer to Senator La Follette, that the bill first said the commission should ascertain all values.

Mr. COMMONS. Yes.

Senator LAFOLLETTE. I will say that when he comes to go over the bill I am going to suggest the introduction of that word in line 6, page 4.

Senator LIPPITT. I just want to put this in, in conjunction with what was said before.

I was going to ask you what you meant by 'at first.'

Mr. COMMONS. I think that is on page 4. I thought that was agreed to the other day, on page 4, line 5, 'report the value of all property.'

Senator LIPPITT. But that expression is qualified by the words at the end of line 4 and beginning of line 5, 'as hereinafter provided.' So that the commission only reports those values as 'hereinafter provided, which means largely as provided in paragraph 1, so that is not an all-inclusive phrase, although it appears to be.

Mr. COMMONS. It seems to mean first, second, third, and fourth.

Senator LAFOLLETTE. They shall take all the values, and then it prescribes the method which shall be adopted. That is the method it refers to.

Senator LIPPITT. That is the way it ought to do, but as a matter of fact, the way the bill reads, it also refers to the values themselves. But that is a detail we can correct hereafter.

Senator CUMMINS. Professor, Senator Lippitt, in making inquiries, several times inquired as to the effect that the present income should have in determining values, and I was not quite clear about your answer. The only purpose, I take it, of this bill and of the valuation that is proposed in it is to enable us to ascertain in a proper way whether a given income enjoyed by a particular common carrier is too large or too small.

Mr. COMMONS. Yes.

Senator CUMMINS. Otherwise we would not have any concern in it?

Mr. COMMONS. I think that is correct.

Senator CUMMINS. Therefore, is it not clear that, when the thing we are trying to ascertain is whether the income is too large or too small, the income actually in enjoyment can not be a factor in determining the value of the property at all, because that is the very unknown quantity we are endeavoring to make specific?

Mr. COMMONS. And I think the court has recognized that by seeking other standards.

Senator CUMMINS. So that, whatever may be the standards employed to ascertain whether a given rate or a given income is too great or too small, we must of very necessity resort to other elements of value in order to ascertain what is the rate-fixing value?

Mr. COMMONS. Yes, sir.

Senator LIPITT. I would suggest to the Senator from Iowa that as I remember that inquiry it referred to an answer which the witness made, and particularly referred not so much to the income itself as to a continuance of the conditions that would allow income to be made; that is, the value of property depended, as an illustration, upon the fact that it was the only railroad supplying a certain town with its supplies and that there was a probability that another railroad would shortly be competing with it for that particular business, so it would have to share the business of that town with another railroad. I think that idea was suggested by the professor as one of the elements by which we would get at the present values, and it was not whether or not the absolute income was to continue or whether the conditions under which it was possible to make incomes would continue.

Senator CUMMINS. That may be, but I wanted the one fact to appear clearly.

Mr. COMMONS. I think that the Senator summed up my specifications. I perhaps brought into the proposition the actual income at the present time and all the conditions which a person seeking to purchase it, or considering what it is worth to him, would take into account, and those are other considerations than the actual income. They are, of course, its certainty and duration mainly.

The CHAIRMAN. Professor, you may now take up the bill—the one designated as ‘Committee print,’ containing changes proposed by Mr. Bemis—and go through it and point out such changes or make such suggestions as you desire to make with reference to the bill itself.

Mr. COMMONS. In line 5, page 4, after the words ‘value of,’ I would insert the word ‘all.’ I think possibly that was agreed upon.

Senator CUMMINS. Did you give your attention to the suggestion of striking out the words, in line 7, ‘And used by it for the convenience of the public’?

Mr. COMMONS. Yes; I would think that is proper; and insert, ‘and owned or used by it.’

I think it is suggested that the term, ‘for the convenience of the public,’ should be stricken out at that point, and I would strike that out because that limits it. We want all the property valued.

Senator CUMMINS. ‘And owned or used by it’?

Mr. COMMONS. Yes; and a period after the word ‘it’; and cut out the words ‘for the convenience of the public.’

Then, it seems to me, in line 10, at the end of the word ‘necessary,’ the suggestion was made the other day of putting in a period and inserting the words ‘the commission may appoint examiners.’ Then it would read.

The commission may appoint examiners, who shall have power to administer oaths, examine witnesses, and take testimony.

Senator LIPPITT. While you are right there, that language, 'shall employ such engineers, experts, and other assistants,' might be changed, as that word 'experts' rather implied the engineers were not expert, but all the others were. It is rather a clumsy phrase there.

Mr. COMMONS. I should omit 'engineers,' and say 'experts and other assistants,' but I wonder if that is essential?

Senator CUMMINS. It should read 'to employ such experts and other assistants.'

Mr. COMMONS. Yes; that would be the suggestion.

Senator CUMMINS. You really think the engineers are experts?

Mr. COMMONS. Yes; but it does not include other classes of experts.

Senator LIPPITT. The word 'engineers' might be left out.

Mr. COMMONS. I would leave out 'engineers' on that suggestion. It had not occurred to me.

There is another suggestion, that those words in line 14, 'in detail,' should be advanced in line 12, after the word 'list'—'shall list in detail the property of every common carrier.' That, I understand, is tangible and intangible property.

Senator CUMMINS. I want to suggest one point to see how it occurs to you. It has occurred to me that if, in line 15, page 4, it were to read 'and shall classify the physical property as nearly as practicable,' instead of 'shall classify the physical elements of such property,' that it would be an improvement.

Mr. COMMONS. I think that would be an improvement.

Senator CUMMINS. It was the same question that I asked Prof. Bemis.

Senator POMERENE. Will you please repeat your suggestion.

Senator CUMMINS. It would be to strike out the words 'elements of such,' so as to read 'and shall classify the physical property.' As it is found here it is simply intended to classify the physical property into various classes, such as engines and cars.

Senator POMERENE. Do you use the word 'physical' there as contradistinguished from the intangible property—the franchise? Why not include that as well as the other?

Mr. COMMONS. Lines 15, 16, 17, and 18 will explain the reason for that. The classification follows, that the physical property should be classified as the railroad commission already classifies the expenditures on physical property—that is, road and equipment. This classification, then, would fit in with their operating classification.

Senator POMERENE. That is, it would exclude all such elements as good will, franchises, etc.

Mr. COMMONS. At that point.

Senator LA FOLLETTE. They are all listed in detail in value.

Senator POMERENE. Very well.

Senator LIPPITT. That would read, then, as you have it, 'classify the physical property as nearly as practicable.'

Mr. COMMONS. Yes, sir.

Senator LIPPITT. Now, I would like to ask, Professor, if it would not be well, on the seventeenth line, instead of saying 'as prescribed,' to say 'as may be prescribed by the Interstate Commerce Commission'? This phrase, as I understand it, refers to a method that has already been employed by the Interstate Commerce Commission, but I presume they may change it from time to time over a period of years.

Mr. COMMONS. Yes, sir; I should hope they would, for this purpose.

Senator LIPPITT. And that would give a great deal more leeway to the commission.

Mr. COMMONS. 'As may be prescribed,' in line 21.

Senator CUMMINS. Is it the suggestion, then, that it should read 'classify all property as nearly as practicable and as may be prescribed by the Interstate Commerce Commission'? Is that what it means?

Senator LA FOLLETTE. 'Shall classify the physical property as nearly as practicable in conformity with the classification of expenditures for road and equipment as may be prescribed by the Interstate Commerce Commission.'

The purpose of introducing those words is not to hold them to the classification which they have already prescribed.

Senator POMERENE. It would not do it as it is.

Senator LA FOLLETTE. I do not think it would. 'As nearly as practicable' would give them some latitude.

Senator POMERENE. It may be prescribed at that time. If it is two years hence and is a regulation, then it is prescribed as then.

Senator LIPPITT. Five years from now they may want to change their method.

Mr. COMMONS. Very well; make the inventories as prescribed at that particular time. I do not see the necessity for the words 'may be.'

Senator CUMMINS. The point in my mind was whether it needed to be qualified by the phrase 'expenditure for road and equipment.' If the Interstate Commerce Commission wanted to make a classification for those purposes—that is, for the valuation—it seemed to me that it is wise that they should have the authority to do it. I do not know that they would want to do it. It might simply be duplicating.

Senator LA FOLLETTE. I went over that with Commissioner Myers pretty carefully and the only change which he suggested in that wording, as it was passed by the House was 'as nearly as practicable.'

Senator CUMMINS. I think that would introduce sufficient latitude. It would enable them to make such modifications of the present classification as they wanted.

The CHAIRMAN. You may proceed, Professor.

Mr. COMMONS. On line 21 'railway purposes' would become 'for its purposes' and possibly 'as a common carrier.' It would then read, 'owned or used by said common carrier for its purposes as a common carrier,' and a comma, and then on line 23 less depreciation is certainly important. On page 5, after 'values,' insert 'and elements of value.' I see no objection to that at all.

Senator LIPPITT. Where is the last suggestion?

Mr. COMMONS. On page 5, after line 2.

Senator LA FOLLETTE. After the word 'values' insert 'and elements of values.'

Mr. COMMONS. 'Values and elements of values.' Lines 6 to 13, or particularly in lines 10 and 11, there is one method of ascertaining laid down, and that is 'by comparison with adjoining lands.' I would cut out that phrase 'by comparison with adjoining lands, leaving it open to the commission to use any method that it finds applicable, and make it read 'ascertained as of the time of acquisition.' Then, in line 11, strike out 'at the present time' and make it read 'and the present value of the same,' so that the commission would not be tied down to one method of ascertaining.

Senator LIPPITT. How does that read—'terminals used for railway purposes'?

Mr. COMMONS. Instead of 'railway purposes' use again the words 'for the purposes of a common carrier' and a comma after 'carrier,' and insert the words 'and ascertained as of the time of acquisition' then a comma after 'acquisition,' and insert 'the present value of the same,' which means, of course, the same lands, etc.—'present value of the same.' Then, going on, 'and separately the original and present cost of condemnation or damages or purchase, in excess of such,' and I would strike out the words 'comparative values' and substitute 'original cost or present value.' I think in line 6 it was suggested that the word 'the' at the end of

line 6 be cut out and in line 7 the words 'original cost and the present value of improvements' should be cut out, so that it would read, 'such investigation and report shall state in detail'; strike out the word 'and' in line 8—'shall state in detail separately from improvements, the original'; and then I would strike out 'and present values' and insert 'cost,' so that it will read, 'the original cost of all lands, rights of way, and the terminals used for the purposes of a common carrier and ascertained,' etc.

Senator POMERENE. Do you mean cost to the company?

Mr. COMMONS. Yes, sir.

Senator POMERENE. Suppose it was a railway in which the right of way has been donated, as is often the case, through a county. It may be donated by the citizens without any actual cost to the company, but nevertheless it is property; it is part of the cost of the railroad, and it ought to be taken into consideration, it seems to me, in determining rates, etc.

Mr. COMMONS. Yes. That, it seems to me, is cared for wholly on page 6, in the paragraph numbered fifth. Shall we go on with that paragraph now?

Senator POMERENE. I am not particular about it. I simply suggested it as it came up. We can consider that later.

Senator LIPPITT. Why strike out 'the present values'?

Mr. COMMONS. I put that term forward in line 11—'present value of the same.'

Senator LA FOLLETTE. Are you reading from line 8? I do not think I have it correct.

Mr. COMMONS. Beginning on line 6 it would read, 'such investigation and report shall state in detail separately from improvements, the original cost of all lands, rights of way, and terminals used for the purposes of a common carrier.'

Senator LA FOLLETTE. 'Owned and used.'

Mr. COMMONS. 'Owned and used.'

Senator LIPPITT. 'Owned or used.'

Mr. COMMONS. 'Owned or used for the purposes of a common carrier and ascertained as of the time of acquisition, and the present value of the same, and separately the original and present cost of condemnation and damages or purchase in excess of such original cost or present value.'

Senator CUMMINS. You do not strike out in lines 8 and 9, then, the words 'and present values'?

Mr. COMMONS. In lines 8 and 9 I would strike out at that place 'and present values.'

Senator CUMMINS. But did you put it in again?

Mr. COMMONS. It comes down in line 11 instead of the words 'at the present time,' which should be stricken out, and we say 'and the present value of the same.'

Senator CUMMINS. Oh, yes I see.

Mr. COMMONS. Then, in line 15, 'the property held for.' I would insert there the words 'purposes other than' and then strike out 'transportation purposes' and say 'those of a common carrier,' making it read 'purposes other than those of a common carrier.'

Senator LIPPITT. Where is that?

Mr. COMMONS. That is in line 15. After the words 'held for' insert the word 'purposes,' and then it would read 'other than those of a common carrier,' having stricken out 'transportation purposes.'

Senator LA FOLLETTE. Would you mind reading through the paragraph marked 'second'—subdivision marked 'second'—again? I just want to make certain that I have it correctly.

Mr. COMMONS. (reading):

Such investigation and report shall state in detail, separately from improvements, the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier and ascertained as of the time of acquisition and the present value of the same, and, separately, the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Senator CUMMINS. Why do you put in separately the original cost of condemnation? That would be covered in the original cost of acquisition, would it not?

Mr. COMMONS. Well, cost of condemnation is a sort of overhead which shall have to be distributed throughout. You can not always affix it to each particular item.

Senator CUMMINS. Do you mean the cost aside from what is paid for the property?

Mr. COMMONS. Yes, sir.

Senator CUMMINS. Oh, I see.

Mr. COMMONS. Legal expenses, damages to adjoining property. The reason for that is because this whole question of comparison between the lands which the company secured and the adjoining land is involved in arriving at a reasonable value, and the value of the adjoining land comes up separately from the legal and other costs involved in exercising its authority?

Then, over on page 6, I notice, in line 3, I have marked there, after the word 'the,' the words 'and upon the amount of moneys.' That seems all right.

SENATOR. Why not leave 'moneys' out? Why not say, 'upon the amounts'?

Mr. COMMONS. Very well, 'amounts,' so as to make it read, 'from the amounts derived from the net and gross earnings.'

Senator LIPPITT. Really the way that should read, it seems to me, would be 'and upon the net and gross earnings,' leaving out the expression 'amounts derived from.' You want the report upon the net and gross earnings. That expression is perfectly definite. They have to report on what the net and gross earnings are.

Mr. COMMONS. Certainly; that is an improvement, I should think.

Senator LIPPITT. Strike out and leave it 'upon the net and gross earnings.'

Mr. COMMONS. Yes. Then, in line 8, there was suggested the insertion, after the word 'gift,' the words 'grants of rights of way,' and it would read 'any aid, gift, grant of right of way, or donation,' striking off the 's' off of donation, making it all singular — 'any aid, gift, or grant of right of way, or donation.'

Line 19, at the end of that paragraph, I would add, as suggested the other day, 'also collections from or allowances by the companies to said Governments.'

Senator CUMMINS. Is that intended to cover the amount, or if you please, the discrimination which is given to the Government in the movement of its freight and property, etc., under the grant of the right of way?

Mr. COMMONS. Yes, sir; if the Government has received any valuable services or contributions in consideration of those grants, it certainly should be taken into account.

Senator LIPPITT. Is that not a little ungrammatical?

Senator LA FOLLETTE. What is that wording?

Mr. COMMONS. I took it down——

Senator LA FOLLETTE. 'Also collections from'——

Mr. COMMONS.. 'Collections from or allowances by the companies to the said Government.' I understood from Mr. Trumbull that there were certain collections

made by the companies for the Government. I have not in mind what they would be, but any term that would cover that which had been given by the company.

Senator CUMMINS. What you really want is the difference between what the company charged the Government and what it would charge some person else for doing the same work.

Mr. COMMONS. That, I understand, is allowances.

Senator CUMMINS. I do not know whether you would call them allowances or whether that would cover it or not. For instance, it transports troops for a cent a mile.

Mr. COMMONS. I think it is stated much more in detail here in this other revision which was submitted by Mr. Trumbull on page 7.

Senator CUMMINS. Just a moment. How would you get at that? Take a railroad—we will say its passenger rate is 3 cents a mile—the regular passenger rate. They take Government troops at 1 cent a mile, but at the same time they take an excursion and large bodies of men under certain circumstances at less than a cent a mile, or not more than that. I have known a great many instances of that kind. How would you get at that allowance?

Senator LA FOLLETTE. I suppose they would have to institute a comparison with what they charge for carrying the public, and if there is any difference in favor of the railroad, report that.

Mr. COMMONS. They would have to introduce a classification of the same kind.

Senator LA FOLLETTE. The classification and charge which they made at the time, and then make the comparison.

Senator CUMMINS. Take into account passes, etc. I know we had an investigation in my own State where the passenger rate by law is 3 cents a mile, and the actual receipts by the company for carrying passengers was less than 2 cents a mile.

Mr. COMMONS. Well, according to that, the State donated 1 cent a mile, did it not? It would come in under the head of donations.

Senator CUMMINS. No; that was made up of the reduced fares of people going out of the State to hunt land in other States in fair times, and soldiers' reunions, everything of that kind went in to make that up; also passes. Well, I see the idea, and I think it is a just one, but I would like to see it expressed so that it would convey the idea intelligently.

Senator LA FOLLETTE. Here is the way Mr. Trumbull furnished it, or the way it is reported in the prints of the bill—

Mr. COMMONS. It is page 7, line 4, of the subcommittee print of amendments suggested by railway officials.

Senator LA FOLLETTE. It reads:

Also the collections from or allowances by such common carrier to the Government of the United States, or to any State, county, or municipal government, on account of such aid, gift, donation, or grant.

Senator CUMMINS. That would not be of the slightest value unless at the same time the balance was struck by the commission, and it was ascertained just what the reduction really was from fair rates.

Senator LIPPITT. That means really that in getting the gifts from the Government they want also to record any offsets that were made by the railroads in consideration thereof?

Senator CUMMINS. That is right, but I do not like the language that is employed there to express it.

Senator LA FOLLETTE. I think that we might pass that and take up something else that we can deal with.

At this point, without concluding the consideration of the bill, the committee took a recess until Monday morning, February 17, 1913, at 9 o'clock a.m.

Monday, February 17, 1913.

COMMITTEE ON INTERSTATE COMMERCE,
UNITED STATES SENATE,
WASHINGTON, D. C.

The committee met at 9 o'clock a. m., pursuant to recess, for the purpose of further considering the bill (H. R. 22593) providing for the physical valuation of the property of common carriers.

Present: Senators Clapp (chairman), Lippitt, La Follette, Foster, Clarke, Gore, and Pomerene.

Statement of Prof. John R. Commons—Resumed.

Senator LA FOLLETTE. Mr. Chairman, I would suggest that Prof. Commons take up for consideration that portion of the bill which deals with the procedure. He has some suggestions to make regarding that portion of the bill, and I would suggest that he submit them in writing and let them be printed unless it is the desire of the committee to go over them with him and question him about them.

Mr. COMMONS. I have here a draft of my suggestions.

Senator LA FOLLETTE. As to the whole bill?

Mr. COMMONS. Yes; in addition to all that I had previously discussed.

Senator LIPPITT. I think it would be a very good idea to have them printed so we could see how they will appear.

Senator LA FOLLETTE. I suggest, Professor, that you start with the title page and we will run through the bill from the beginning.

Mr. COMMONS. In the title, the last four words, 'and boards of directors,' should be stricken out, because the bill as changed does not include finding information as regards boards of directors.

Senator LIPPITT. Do you leave out the word 'physical'?

Mr. COMMONS. Omit the word 'physical.'

Senator LIPPITT. And the word 'the,' and after the word 'valuation' insert 'several classes of property.'

Mr. COMMONS. 'Several classes of property.'

Senator LIPPITT. 'Securing information'—

Mr. COMMONS. 'Concerning their stocks and bonds.' Stop there. Omit 'and boards of directors.'

Senator LIPPITT. Why do you not say 'concerning their securities'? That is a broader term.

Mr. COMMONS. That will be all right. That is what I intended. The bill contemplates that.

Senator LIPPITT. It is a broader term.

Senator LA FOLLETTE. What we intended in that is not included in stocks and bonds. Stocks and bonds is the term that is always used in connection with railroad securities rather than securities, and I think the public would have an understanding of that language that it would not have of securities.

Mr. COMMONS. The bill says 'stocks, bonds, or other securities,' on pages 5 and 6.

Senator LIPPITT. 'Stocks, bonds, or other securities.' Then you have the whole story.

Mr. COMMONS. 'Stocks, bonds, and other securities,' then.

Senator LA FOLLETTE. Yes.

Mr. COMMONS. On page 4 of this committee print—we spoke of this the other day—line 5, after the words 'value of,' insert the word 'all.' Then, in line 7, strike out the words 'for the convenience of the public' and, after the word 'and,' in the same line, insert 'owned or.'

Senator LA FOLLETTE. Now, there is one thing that occurs to me there, and I would like to ask you a question about it. The language is, 'report the value of the property of every common carrier subject to the provisions of this act and owned or used by,' etc. Now, take leased property. Would that be the value of that property, taken the same way and with the same effect as though the railroad company owned it, or would it not?

Senator POMERENE. If they have leased it, they are using it, are they not?

Senator LA FOLLETTE. Yes; they are using it, of course; but there are two ways, it occurred to me, in which it might be treated—the amount paid for the rental of the property as an operating expense, or it might be treated as an investment—and I just wanted to have it clear and have it understood.

Senator LIPPITT. I think, with that phraseology as it is now, you have two suggestions that may become confused. There was one suggestion, as I remember it, made originally, that we strike out everything after 'act' on line 7 and put in the word 'all' before the word 'the' on line 5, just as the professor has said, so that it will read: 'The commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property of every common carrier subject to the provisions of this act,' and stop there; and then I think there was——

Senator LA FOLLETTE. I think I made the suggestion myself that there would be property that did not belong to the carrier and that ought to be accounted for in some way, either valued or brought in in some other way, and I simply wanted to ask the professor if it would be economically sound treatment to value the property that is leased as if it were owned. That is what this phraseology proposes to do.

Senator LIPPITT. Then I would suggest, if you are going to do that, to put in these words after 'property': 'And report the value of all property under lease, subject to the provisions of this act.'

economist—the proper way to reach the leased property in making valuations.

Senator LA FOLLETTE. Yes; but I just wanted to get his idea as a political

Mr. COMMONS. That would have to be taken into account with reference to the fixed charges. If it is a lease, they might have it appear in their operating or fixed charges; and I should think that this would leave it to the commission to look into the facts of the case and see whether they are cared for in one way or the other.

Senator LA FOLLETTE. Would the result be the same, whichever way we cared for it—I mean so far as the railroad interests are concerned and so far as the public interests are concerned?

Senator LIPPITT. Why not make that read 'owned, leased, or otherwise used by every common carrier subject to the provisions of this act'?

Mr. COMMONS. I should think the value of the property that is leased ought to be ascertained. It might be that it is owned by some other railroad corporation, and if so it would have to be considered as the property of the other corporation. It would have to be cared for.

Senator LA FOLLETTE. Would there be any danger of getting a double valuation of that property? A property might be owned by one railroad company and operated by that railroad company and another railroad company might be given the privilege of using the tracks to run its trains over.

Mr. COMMONS. The commission would be compelled to——

Senator LA FOLLETTE. There should not be but one valuation, of course.

Mr. COMMONS. I should think this would leave it to the commission to ascertain the actual condition.

Senator LA FOLLETTE. Very well, I just wanted to bring that to your attention.

Senator LIPPITT. How do you think it ought to be —‘owned or used’ or how?

Mr. COMMONS. I am uncertain.

Senator LIPPITT. It would be a lawyer’s job to fix that. I think the words ought to come in after ‘property,’ at any event. You see they are put in now because you had that phrase ‘the convenience of the public.’ When you strike that out, the words should come in ‘report the value of all the property owned or used by every common carrier, subject to the provisions of this act.’ That is a proper place for it, do you not think so?

Mr. COMMONS. Yes; I think that is the place. It would then read, ‘all the property owned or used by every common carrier subject to the provisions of this act.’

Senator LIPPITT. Yes; strike out ‘of.’ You strike out everything after the word ‘act.’

Mr. COMMONS. Yes; everything after the word ‘act’ in line 7. Then in line 9——

Senator LA FOLLETTE. What is that suggestion? Suppose you state it again.

Mr. COMMONS. In line 7, strike out all after the word ‘act,’ namely, ‘and used by it for the convenience of the public.’ Then, after the word ‘property,’ in line 6, insert ‘owned or used by’ in place of the word ‘of,’ so that it will read, ‘of all the property owned or used by every common carrier subject to the provisions of this act.’

In line 9 strike out the word ‘engineers.’ In line 10, after the word ‘necessary,’ place a period and then introduce the words, ‘the commission may appoint examiners who shall have power to administer oaths, etc.’

In line 15 I think it was the suggestion to strike out the words ‘elements of such,’ so that it would read, ‘shall classify the physical property.’

Senator LA FOLLETTE. Just a moment. In line 10, after the word ‘necessary,’ where you substituted a period for the comma, you insert ‘the commission may appoint examiners’?

Mr. COMMONS. Yes, sir.

Senator LA FOLLETTE. ‘Who shall have power to administer oaths, examine witnesses, and take testimony’?

Mr. COMMONS. Yes.

Senator FOSTER. Is it ‘may’ or ‘shall’?

Mr. COMMONS. ‘May.’ In line 21 strike out ‘railway purposes’ and substitute ‘its purposes as a common carrier’ and place a comma, so that it will read ‘or used by said common carrier for its purposes as a common carrier.’ and a comma.

In line 23 strike out ‘in depreciated condition’ and substitute ‘less depreciation.’

Senator LA FOLLETTE. You make no change between lines 10, of page 4, and line 21, do you? If you have, I have not noted it.

Senator LIPPITT. Yes; on line 15, the words ‘elements of such.’

Senator LA FOLLETTE. Those are taken out?

Mr. COMMONS. Strike out the words ‘elements of such.’

Senator LA FOLLETTE. Is that all?

Mr. COMMONS. There was a question on line 18 as to whether the words ‘may be prescribed’ should be inserted. I do not see that that makes any difference. Then, on page 5, line 2, after the word ‘values’——

Senator LA FOLLETTE. May I go back to lines 16 and 17? That may be right the way it is, but what was proposed in that was in line 16, after the word ‘with,’

the word 'such' was to be put in, so that it would read 'in conformity with such classification of expenditures for road and equipment as may be prescribed by the Interstate Commerce Commission.'

Mr. COMMONS. There is no objection to that.

Senator LA FOLLETTE. That changes that. It leaves the commission in command of the whole matter. They might devise a better classification than that which they have now.

Senator LIPPITT. From time to time. It leaves them in a stronger position than they would be in now to say, 'In conformity with such classification as may be prescribed.'

Mr. COMMONS. I think that is a good change. On page 5, line 2, after the word 'values,' insert 'and elements of value,' and insert a comma.

Senator LIPPITT. What is the meaning of that phrase, 'and elements of value'—'value and elements of value'? What is the difference between 'value' and 'elements of value'?

Mr. COMMONS. It was a suggestion that was made here, and I could not see any objection to it from the standpoint of ascertaining all the values.

Senator LIPPITT. I thought there might be some point about it that does not occur to me.

Mr. COMMONS. Anything that a party wants to bring up which he considers to be an element of value, a going concern, or anything else. Any comprehensive and inclusive phrase that we can use, so that anything can be considered.

In the paragraph marked 'second,' lines 6 to 13, which I find on page 124 of my testimony—

Senator LA FOLLETTE. First of all, you strike out beginning with the last words in line 6. That has been done in every bill, because that was a misprint—the original cost and the present value of improvements.'

Mr. COMMONS. I was going to read it as a whole, as I would have it. I proposed that the word 'acquisition' should be used. I would substitute for that the term—

Senator LIPPITT. You are now referring to page 124 of your testimony?

Mr. COMMONS. Yes, sir; page 124 of my testimony. I proposed that the word 'acquisition' should be used.

Senator LIPPITT. In place of what?

Mr. COMMONS. Well, it was the same as there, but I would suggest in place of that to use the term 'dedication to the public use,' the point being that 'acquisition' is indefinite. It might be the acquisition by the present corporation; whereas, what is intended is the acquisition at the time it was acquired for public purposes.

Senator LIPPITT. Do you mean, Professor, that you are now referring to the third line of your proposed substitute on page 124 of your testimony, after the words 'as of the time of'?

Mr. COMMONS. Yes; where it says, 'at the time of acquisition.' I would strike out 'acquisition' and insert 'dedication to public use.'

Senator LA FOLLETTE. Why not read the paragraph through in the way you propose it now and then make your explanation of any change in phraseology, and then we can afterwards see the application of it.

Mr. COMMONS. The paragraph would read then:

Second. Such investigation and report shall state in detail, separately from improvements, the original cost of all lands, rights of way and terminals owned or used for the purposes of a common carrier and ascertained as of the time of dedication to public use, and the present value of the same, and, separately, the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Senator LA FOLLETTE. I will have to ask you to state that again, because you went over it so rapidly. I am preparing a bill here which I will leave with the committee to have printed to-morrow, and I would like to get accurately your suggested amendments.

Mr. COMMONS. In line 6, strike out the last word 'the'; in line 7, strike out 'original cost and the present value of improvements'; in line 8, strike out the words 'and present' and insert the word 'cost'; in line 9, strike out the word 'values,' at the beginning of the line, and then after the word 'terminals' insert the words 'owned or'; then after the word 'for' strike out 'railway purposes' in lines 9 and 10 and substitute 'the purposes of a common carrier' and a comma, and insert the word 'and.'

Senator LA FOLLETTE. Your proposition is to insert in that line 'for the purposes of a common carrier, and'?

Mr. COMMONS. Yes.

Senator LA FOLLETTE. Now, what do you strike out in line 10 as originally printed?

Mr. COMMONS. We strike out 'railway purposes,' and then after the word 'ascertained' strike out the words 'by comparison with adjoining lands at' and insert 'as of.'

Senator LA FOLLETTE. 'Ascertained as of.'

Mr. COMMONS. Yes. Then strike out the word 'acquisition' and insert the words 'dedication to the public use' and a comma. In the same line, line 11, strike out the words 'at the present time' and insert the words 'and the present value of the same' and a comma.

Senator LIPPITT. What is the amendment on line 11?

Mr. COMMONS. In line 11, strike out the words 'at the present time.'

Senator LA FOLLETTE. You strike out the word 'acquisition' and also the words 'at the present time'?

Senator LIPPITT. Not the word 'and'; you leave the word 'and' in, do you not?

Senator LA FOLLETTE. The word 'and' is in at the end of the line.

Mr. COMMONS. No; the first 'and,' the one immediately following the word 'acquisition,' and the last one in the line.

Senator LA FOLLETTE. It does not make any difference whether you leave it in there or at the end of the line—'and, separately, the original and present cost,' etc.

Mr. COMMONS. There are two words 'and' in that line, and they are essential. They should both be retained.

Senator LA FOLLETTE. 'And ascertain as of the time of dedication to public use'; is that the way it reads?

Mr. COMMONS. Yes; and a comma.

Senator LA FOLLETTE. A comma and the word 'separately'?

Mr. COMMONS. No; 'and the present value of the same.' Line 13, strike out 'comparative values' and substitute the words 'original cost or present value.'

Senator LA FOLLETTE. Do you leave the word 'and' after 'same' and 'separately'?

Mr. COMMONS. Yes.

Senator LA FOLLETTE. So it will read, 'and separately the original and present value'?

Mr. COMMONS. (reading):

And separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Senator FOSTER. 'Original cost or present value'?

Mr. COMMONS. Yes, sir.

Senator LA FOLLETTE. Now, in order that I may get all of those corrections, will you read that again?

Mr. COMMONS. It should read:

Such investigation and report shall state in detail and separately from improvements the original cost—

Senator LIPPITT. Do you leave that word 'and' in at the beginning of line 8—'in detail and separately'?

Mr. COMMONS. Yes, sir (reading):

And separately from improvements the original cost of all lands, rights of way, and terminals used for the purposes of a common carrier and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or purchase in excess of such original cost or present value.

Line 15 on the same page, after the word 'for' in the middle of the line, insert the word 'purposes.' At the end of line 15 and the beginning of line 16 strike out the words 'transportation purposes' and insert 'those of a common carrier,' so that the lines will read, 'shall show separately the property held for purposes other than those of a common carrier' and a comma.

Senator LA FOLLETTE. May I interrupt you there for a moment. 'Those of a common carrier'; is that such a comprehensive term as would include the property of a telephone or telegraph company? As I remember it, in the act of 1910 we brought in the telegraph and telephone companies under the interstate-commerce act.

Mr. COMMONS. I understand that it will include telephone, telegraph, and express companies and any owners of property that come under the act as a whole.

The CHAIRMAN. It would not, Senator, except for the definition that is given in the act as amended.

Senator LA FOLLETTE. The definition was made to include that?

The CHAIRMAN. Yes.

Mr. COMMONS. On page 6, line 3, strike out the words 'moneys derived from the,' so that it will read, 'and upon the net and gross earnings of such corporations.'

Line 8 of the same page, after the word 'gift,' insert 'grant of right of way,' and then strike out the 's' from the word 'donations,' making it singular.

In line 19 change the period to a comma and add the words 'also any offsets made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, donation, or grant.'

On page 8, line 2, add a new sentence, as follows:

Unless otherwise ordered by the commission, with the reasons therefor, the records and data of the commission shall be open to the inspection and examination of the public.

Senator LIPPITT. What is the difference between 'inspection' and 'examination'? I suppose it is all right, but it is a little tautological.

Mr. COMMONS. I can, of course, define the difference; but I see no objection to putting them all in. Page 8, lines 8, 9, and 10, strike out 'as may be required for the proper regulation of such common carrier under the provisions of this act.'

On line 12, at the beginning of the line, insert the word 'separately,' so that it will read, 'separately in each of the several States,' etc.

On the same page, lines 18 to 22, strike out the words 'report currently to the commission, and as the commission may require, all improvements and changes in

its property and file with the commission copies of all contracts for such improvements and changes at the time the same are executed,' and substitute the words 'make such reports and furnish such information as the commission may require.'

Senator LA FOLLETTE. That would cover it, I think.

Mr. COMMONS. In the next paragraph, beginning on page 8, line 23, and ending on page 9, line 16, I would make several changes, and if you will allow me to read it as I have it first I can then indicate afterwards where they are to be written in. I would have it read as follows:

Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall be made final, the commission shall give notice by a registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to the mayors and principal commercial bodies of the principal cities through which the line of such common carrier extends. Such notice shall state the valuation placed upon the several classes of property of said carrier, and shall allow 30 days in which to file a protest of the same with the commission. If no protest is filed within 30 days, said valuation shall be made final as of the date thereof.

The CHAIRMAN. Who is going to determine what the principal cities are, and what the principal commercial bodies are?

Mr. COMMONS. The Interstate Commerce Commission.

The CHAIRMAN. Would it not be better, then, to designate the Attorney General and the governors, and then say, 'such additional notice as the Interstate Commerce Commission may prescribe'?

Mr. COMMONS. The commission will be required to print in pamphlet form the valuation. They can send it to anybody who inquires for it. They have a mailing list of all the commercial bodies in the country.

The CHAIRMAN. But, Professor, here is a direction that indicates the purpose of Congress, that they shall send to some without any designation or discretion. My objection to so much of these things is just that very point.

Mr. COMMONS. Well, the criticism is good. I will change it.

The CHAIRMAN. 'And such additional parties as the commission may prescribe.'

Mr. COMMONS. Yes. That, you will notice, strikes out the words requiring it to be published in the daily papers. That would greatly reduce the expense and the papers would publish it anyhow as a matter of news. Now, shall I go over this and indicate the wording that I would suggest?

Senator LA FOLLETTE. Yes.

Mr. COMMONS. In line 25 of page 8—

Senator LA FOLLETTE. Do you strike out anything in line 23?

Mr. COMMONS. No; lines 23 and 24 remain the same. Line 25 is stricken out altogether. The top of page 9, line 1, is stricken out, and in place of those two lines use the words 'as herein directed.'

Senator LA FOLLETTE. Do you strike out line 2?

Mr. COMMONS. I have not reached line 2 as yet. Line 1, on the top of page 9, strike out the entire line and substitute the words 'as herein directed. Line 2, on page 9—

Senator LA FOLLETTE. What about line 3?

Mr. COMMONS. I want to strike out the sentence there. Strike out from lines 2, 3, and 4, page 9, the phrase, 'be considered in any proceeding involved in the act to regulate commerce,' and substitute the words, 'be made final.'

Senator CLARKE. Yes; there ought to be some other words there, not only for the purposes of this act but for any litigation in which that question comes into issue.

Senator LA FOLLETTE. He will come to that in a moment.

Mr. COMMONS. Then, in lines 4 and 5, strike out also the words, 'in addition to notices to petitioners and carriers required in such proceeding.'

Then, in lines 9 and 10, strike out also, 'by publication in three daily papers published in three of the principal cities,' and substitute, 'and such additional parties as the commission may prescribe.'

In lines 10 and 11 strike out the word 'railroad' and substitute the word 'line.'

Strike out, in lines 9, 10 and 11, also, 'by publication in three daily papers published in three of the principal cities through which the railroad of such common carrier runs,' and insert, 'and to such additional parties as the commission may prescribe.' There should be a period after the word 'prescribe,' and beginning with the word 'such' it should be a new sentence beginning with a capital.

Then, in lines 15 and 16, strike out the words 'become permanent' and substitute 'be made final as of the date thereof.'

Senator LA FOLLETTE. Now, will you please read that paragraph as amended?

Senator LIPPITT. Let me suggest that instead of that word 'such' you substitute the word 'which.' I think it will be more grammatical, making it read, 'shall give notice by registered letter to the Attorney General,' etc., 'which notice shall state,' etc. Now go ahead and read it as you have it.

Mr. COMMONS. Do you want me to read it over entirely?

Senator LA FOLLETTE. Yes; I want to be certain that I have the corrections. I have it:

Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall be made final, the commission in addition to notice—

Mr. COMMONS. No; omit that. (Reading):

The commission shall give notice to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such parties as the commission may prescribe, which notice shall state the valuation placed upon the several classes of property of said carrier, and shall allow 30 days in which to file a protest of the same with the commission. If no protest is filed within 30 days said valuation shall be made final as of the date thereof.

Senator CLARKE of Arkansas. Suppose a protest is filed, then it never would become final.

Mr. COMMONS. The next paragraph takes care of that—'shall be made final as of the date thereof.'

Senator LA FOLLETTE. Of course 'additional property' is added.

Mr. COMMONS. At the top of page 10, line 1, strike out the word 'permanent,' at the end of the line, and substitute the word 'final.'

Senator LIPPITT. Is that the whole of that; had you finished that particular paragraph?

Mr. COMMONS. I had finished that particular paragraph.

Senator LA FOLLETTE. And the next paragraph has no change.

Mr. COMMONS. No change.

Senator LIPPITT. I do not think you have that right as a matter of form. You changed it from the original form in compliance with the suggestion of Senator Clapp, and I think you have it a little bit mixed up. Starting now with line 4—

The commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe.

Now, you go on to say, 'notice shall state.' You have said 'shall give notice.' I would say 'stating,' so as to make it read, 'shall give notice stating the valuation.' That is a very clumsy phrase.

Senator LA FOLLETTE. It would be all right if you used the word 'such,' beginning a sentence with it.

Senator LIPPITT. Then you simply state, 'give notice to.' You do not say what sort of notice, or anything else; you simply say 'shall give notice,' but the sentence does not say give notice of what. I would simply say 'stating,' and you would have that grammatically correct.

Senator LA FOLLETTE. You suggest that, do you?

Senator LIPPITT. Yes. The sense of it will be this: 'Shall give notice stating,' etc.

The CHAIRMAN. While you are on that, Professor, you say it shall be made final. It may involve some question as to what operation was required. Why would it not be better to say 'shall become'? It is automatically final if no protest is filed.

Senator CLARKE of Arkansas. Unquestionably that is a preferable form of expression. It might contemplate some affirmative action by the commission, whereas I presume the intention is it shall become final.

The CHAIRMAN. Do you mean they shall formally declare it?

Mr. COMMONS. Yes; if I were to elaborate it I should say they should ascertain, determine, and fix a final valuation, but I was trying to conform to the way in which it was stated here, presuming that that was what was desired. But I thought that was cared for in the next paragraph where the effect of this term is pointed out.

Senator LA FOLLETTE. I can see no objection to using the words 'become final' instead of 'be made final'; do you?

Mr. COMMONS. Of course, I do not know the legal effect of those terms. 'Shall become final.' 'Become' is a proper word there:

Senator LA FOLLETTE. 'Shall become final as of the date thereof.'

Mr. COMMONS. On page 10, line 1, the last word, 'permanent'; change that also to 'final.'

In line 4, the first word, 'permanent,' strike out, and change it to read 'final as of the date thereof.'

Strike out, in the same line, the word 'permanent' where it appears the second time and insert 'final.' Strike out the words 'relative to,' in line 6, and substitute the word 'of,' so as to make it read: 'Evidence of the value.'

In line 7, for the last two words, 'this act,' substitute 'the act to regulate commerce, as of the date of the fixing thereof.' Those two sentences would then read, beginning on line 22, page 9, and running through to line 7, page 10, as follows:

If after hearing any protest of such tentative valuation under the provisions of this act, the commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the commission, and the classification thereof, shall be published, and shall be prima facie evidence of the value of the property in all proceedings under the act to regulate commerce, as of the date of the fixing thereof.

In lines 11 and 12, on page 10, strike out the words 'with all the requirements of this section and in the manner prescribed by the commission' and insert the word 'herewith.'

Line 17, strike out the words 'this act' and substitute the words 'section 16 of the act to regulate commerce,' so that it will read, beginning on line 15:

Such forfeitures to be recoverable in the same manner as other forfeitures provided for in section 16 of the act to regulate commerce.

At some point on page 10, probably between lines 7 and 8, I would insert the following paragraph:

If upon the trial of any action involving a final value fixed by the commission evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the commission or additional thereto, the court, before proceeding to render judgment shall transmit a copy of such evidence to the commission and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend, or rescind any other which it has made involving said final value and shall report its action thereon to said court within the time fixed by the court. If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

Senator LA FOLLETTE. You propose that that shall be inserted as a paragraph between lines 7 and 8?

Mr. COMMONS. Yes. I think that is all I have to suggest, Mr. Chairman.

Senator POMERENE. You would expect a judgment, perhaps, to be rendered in cases fixing valuation for taxation, and matters of that kind. Is that what you had in mind?

Mr. COMMONS. No; I think as to this question of the valuation, as I understand it, final valuation fixed by the commission, will come up in a case of a petition to change the rates, and when it does so come up this merely provides that if new evidence is brought in at that time to the court the court shall remand it back to the commission to consider the new evidence and change its order, or its valuation, and then it goes back to the court again. I do not contemplate any action on the question of taxation, as far as this bill is concerned.

Senator POMERENE. Well, I have not run over this very carefully, but do I understand that there is to be a comparison of the evidence that may be produced before the court and that before the commission?

Mr. COMMONS. A comparison by the commission; yes. The court determines that this evidence which now comes before the court, had not been presented to the commission.

Senator POMERENE. That is, the court determines it?

Mr. COMMONS. The court determines it.

Senator POMERENE. Then he remands the case back to the commission?

Mr. COMMONS. With the new evidence. The commission then can reconsider its finding and its order and its valuation, or it may stand by its former finding and order, but at any rate all the evidence which comes before the court has previously been considered by the commission. You can not, of course, as I understand it,

make these findings binding upon the court, no matter what words you use, final or binding or anything; but you can require the court to send it back to the commission instead of taking evidence itself.

Senator LIPPITT. You then make the commission a judge of its own acts?

Mr. COMMONS. I do not think you can do that at all. I would say I have talked to several lawyers on the subject, and there is such a wide difference of opinion as to whether you can do that or not that it seems to me you can not; consequently, the essential thing is that the commission itself should have all of the evidence and make a determination, not on one part of the evidence, but on all of it, and it is simply a provision that the commission shall have this evidence before it, and if the court then wants to go into the evidence again it is perfectly free to do so. The act can not make the findings of the commission final or binding.

Senator LIPPITT. The purpose of this additional paragraph that you have here is to resubmit the evidence as to valuation to the commission, as I understand it.

Mr. COMMONS. Any new evidence; yes.

Senator LIPPITT. Any new evidence, to the commission, and the commission will consider that evidence and consider whether or not in their opinion any changes are necessarily to be made in their original estimate on account of that new evidence, and then report to the court.

Mr. COMMONS. Yes, sir.

Senator LIPPITT. I am not criticising it; I am only asking for information. So, in a sense, when you submit that new evidence to the commission you make them the judge of the value of the new evidence as applied to their own acts—that is, passing on their own acts?

Mr. COMMONS. In the light of evidence which they did not have previously.

Senator LIPPITT. In the light of evidence which they did not previously have.

Senator LA FOLLETTE. Which they did have, or from which they may have made a different determination.

Senator LIPPITT. And I suppose the court will have the right to finally decide whether the commission was right or not?

Mr. COMMONS. It is provided in the last part of this proposed amendment:

If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance.

Senator LIPPITT. Then, on that, the court would not have any opportunity to approve or disapprove of the commission's ultimate finding.

Senator LA FOLLETTE. Yes; just as it has in the first instance.

Mr. COMMONS. I say here:

If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission judgment shall be rendered upon such original order.

I have referred on page 80 of my testimony to the suggestion made by the railroad officials that the commission should when deemed pertinent report upon the property worn out and displaced by improved property for the betterment of the service or more economical service to the public. This suggestion was accompanied by the proposition that a report on the original cost to date should also be made optional. The fact is, that if the commission is required to report on the original

cost to date, it would be required to report on all property that had cost anything, including abandoned property. To what extent abandoned property should be capitalized against the public would depend upon all the circumstances which the commission is required by the bill to take into account.

There are hundreds of other costs as well as revenues that must be ascertained in deriving the original cost, and the object of the bill is to require the commission to investigate and consider them all, whatever they may be, without any limitations or specific mention. The bill also provides for investigation and report upon all values and elements of value, if any, and this provision is broad enough to include any claim for abandoned property to whatever extent such claim is found to be entitled to weight.

The CHAIRMAN. There will be printed the report of the committee on railroad taxes and plans for ascertaining a fair valuation of railroad property offered by Mr. L. F. Loree, and the hearing before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 12811, which are made a part of this hearing.

At this point the committee took a recess until Tuesday, February 18, 1913, at 10 o'clock a.m., when the bill will be considered in the form suggested by Prof. Commons.

SIXTY-SECOND CONGRESS, SESS. III, CHAPTER 92, 1913.

CHAPTER 92.

An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof by providing for a valuation of the several classes of property of carriers subject thereto and securing information concerning their stocks, bonds, and other securities.

Interstate commerce regulations.
Vol. 24, p. 386,
amended.
Physical valuation
of property of
common carriers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, be further amended by adding thereto a new section, to be known as section nineteen a, and to read as follows:

Investigation
by com-
mission.

'SEC. 19a. That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures

Experts, etc.

Classification
and
inventory.

for road and equipment, as prescribed by the Interstate Commerce Commission.

'First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

Cost of property used for common carrier purposes.

Other property.

'Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Value of real property.

'Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Property held for other than common carrier purposes.

'Fourth. In ascertaining the original cost to date of the property of such common carrier the commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the commission upon the expenditure of all moneys and the purposes for which the same were expended.

Corporate organization.

Stocks, bonds, etc.

Earnings and expenditures.

'Fifth. The commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

Grants, etc., from United States, States, etc.

Value of land grants.

Concessions, etc., made by carrier.

Method
of pro-
cedure.

'Except as herein otherwise provided, the commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

Prosecu-
tion and
report of
investigation.

'Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

Documents,
etc., to
aid in-
vestigation.

'Every common carrier subject to the provisions of this Act shall furnish to the commission or its agents from time to time and as the commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to co-operate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct, and all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the commission, with the reasons therefor, the records and data of the commission shall be open to the inspection and examination of the public.

Access of
agents to
property.

'Upon the completion of the valuation herein provided for, the commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

Effect of
rules, etc.
Vol. 34, p. 593;
Vol. 36, p. 556.
Public
inspection
of records,
etc.

Valuation
of extensions
and im-
prove-
ments.

'To enable the commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the commission may require.

Reports to
Congress.

Informa-
tion re-
quired of
carriers.

'Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow

Notice of
completion
of tentative
valuation.

thirty days in which to file a protest of the same with the commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

Finality
if no protest
filed.

'If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the commission and the classification thereof shall be published and shall be *prima facie* evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as 'the Act to regulate commerce,' and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Hearings
of protests.

Changes.

Effect of
final valuation
and
classification.

Vol. 24,
p. 379.

If upon the trial of any action involving a final value fixed by the commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

Effect of
evidence
offered
in court
as to
different
values.
Trans-
mission to
commission.

Action of
commission.

Modification
of order.

Judgment
on original
order if
not changed.

'The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

Applicable
to receivers,
etc.
Penalty
for non-
compliance
with
requirements.

'That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any

Juris-
diction
of district
courts
to compel
compliance.

common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.'

Approved, March 1, 1913.

APPENDIX 'M.'

REPORT OF THE RAILROAD SECURITIES COMMISSION TO THE PRESIDENT OF THE UNITED STATES.

Report of Commission.

The PRESIDENT:

NOVEMBER 1ST., 1911.

The undersigned have the honor to make to the President the following report as responsive to Section 16 of the Act of Congress approved on June 18, 1910, the material portion of which reads as follows:

That the President is hereby authorized to appoint a commission to investigate questions pertaining to the issuance of stocks and bonds by railroad corporations, subject to the provisions of the Act to regulate commerce, and the power of Congress to regulate or affect the same * * *.

1. RAILROAD SECURITIES AND INTERSTATE COMMERCE.

The railroad companies of the United States, with only one important exception, owe their present corporate existence to state charters and are subject to state laws regarding their issue of stocks and bonds. But a large and growing proportion of their business is interstate commerce, regulated by federal authority. There is a widespread belief that the rates charged on this business are affected by the amount of stocks and bonds outstanding; that much stock has been issued without being fully paid; and that the dividends on this stock represent an unnecessary tax on interstate commerce. The railroad men as a rule deny that the amount of capital of the roads, either nominal or actual, is seriously considered by their agents in making rates. But it is frequently treated by counsel, commissions and courts as a thing of importance in determining whether rates are reasonable. If capitalization has an actual effect on interstate rates, the federal government is interested in its control.

There is still another way in which the issue of stock for less than par may affect the conduct of interstate commerce. The bondholders who loan money to the corporation may be led to believe that there is real security behind the bonds equal to the face value of the stock, when in fact a portion of this value represents nothing more substantial than the expectation of the promoters. So far as this deception affects only the individual bondholder, we may leave it to state law to protect him. But if such deceptions become prevalent they inevitably affect the confidence of investors as a body, and our American railroad systems fail to get the full amount of capital needed for their development and for the proper conduct of their interstate business. It is a matter of direct concern to the federal government that the facilities for handling commerce between the states should not be impaired.

These facilities embrace not only steam railroads, but the other agencies of communication and transportation enumerated in the Act to Regulate Commerce. While for brevity the language of this report is largely confined to railroads, the discussion and recommendations apply generally to these other agencies.

2. PRESENT REQUIREMENTS AND FUTURE POLICY.

Starting from different points, investors and shippers, and through them the general public have come to feel that state legislation has provided inadequate security for their interests in this matter. The question is therefore asked with increasing frequency whether the United States Government should not undertake to regulate the issues of securities by the roads engaged in interstate commerce as a necessary means to its effective control. This question naturally divides itself into two parts: First, what immediate action by Congress will best meet the existing situation; and second, what general principles should guide the federal government in its future legislation on this subject.

As far as concerns the immediate action of Congress, we believe that stringent provisions regarding publicity of stock and bond issues, which will show how far the laws are obeyed, and will enable the federal government to hold the railroad officials responsible for the consequences of not obeying them, will be more salutary and more effective than any new statutory demands. So long as the railways engaged in interstate commerce are chartered by the states and subject to state laws regarding their securities, added federal restriction will tend to create further confusion in a situation already too complex.

But we also believe that the time is near when the difficulties of the present system of dual control, and the conflict of state laws, will become so manifest that further legislation on the subject will be imperative. Unless the constitutional power of Congress to regulate the securities of railroads engaged in interstate commerce is definitely established as being, to the extent that Congress acts upon the subject exclusive of State control, one of two things seems likely to happen; Either the federal government and the governments of the several states will come to a common understanding as to the principles to be adopted in the control of security issues, or the railroad systems will be given the opportunity to exchange their State Charters for Federal ones. We have therefore discussed in some detail the principles which ought to govern the stock and bond issues of railroads in the United States. Whichever alternative we adopt, we ought to have such a set of principles before us. If we are to bring about a common understanding, we need them as a basis of negotiation. If we consider federal incorporation of railroads the more desirable or practicable alternative, we need them as the groundwork of a federal incorporation law, of which our roads may avail themselves when their interests and those of the public require it. Under the terms of the Act of Congress creating this Commission, it has not considered, as an alternative to these possibilities, the direct ownership of the railroads by the government itself. In that case the government would issue its own securities, and none of the questions submitted to this Commission would then arise.

3. THEORY OF RAILROAD STOCK ISSUES.

Everyone knows that railroad securities are divided into two classes, stocks and bonds; very few people apprehend as plainly as they should the distinction between the two, or understand the real nature of a share of railroad stock. As to the real nature of a railroad bond, there is no doubt at all. It is essentially a note made by the company; a promise to pay a certain amount of money, say one thousand dollars, at a specific date of maturity, and to pay interest at specified rates in the meantime. The obligation is definite. The value is limited by the terms of the instrument.

But a share of railroad stock is of a different, and more complex, character. It represents two things instead of one: That a certain sum has been paid in, and that the holder of the stock has a certain *share* in the ownership of the property, of whatever value that may prove to be. The second of these things is what ultimately gives the stock certificate its value. In the case of a railroad bond the fact that it

calls for one hundred or one thousand dollars is a determining factor in what it is worth. But in the case of stock, the fact that the certificate represents one hundred or one thousand dollars is far from being the determining factor. It is but one incident among many. Even in theory it purports merely to show that this was the amount originally paid by the subscriber when the road was built. It does not create an obligation to pay its face value, nor does that face represent its money value as a share. The value varies with the development of the property as a whole. If it has been wisely located and well managed it will be worth more than the amount it represents. If it has been unwisely located, or badly managed, it will be worth less than the amount it represents. The shareholder chose his investment, elected his management and took his risks. If he acted unwisely and fares badly he has no claim that the public should indemnify him. If he did well, the public can not either rightly or wisely fail to recognize and reward his foresight, so long as his road is managed with proper regard to the interest of the community, and for the development of the traffic which it carries.

The principal of a bond is a fixed sum, its interest a fixed charge. The value of a share of stock is essentially variable, its profit essentially indeterminate.

There is a persistent tendency to ignore this distinction; to emphasize unduly the face value of the stock; to treat the shares in a railroad or other public service corporation as claims against the community for the number of dollars they represent, rather than as fractional interests in a more or less hazardous enterprise, in which the investors took risks of loss and chances of profit; to allow corporations to claim immunity from public regulation when the dividend on the face value of the shares is below the prevailing rate of interest; and to subject them to vexatious attacks when this dividend is above the prevailing rate of interest, even when such profit may be a fair compensation for risks actually incurred in the past or a necessary incentive for the investment of new capital and the taking of new risks in the future.

4. STATE LEGISLATION REGARDING STOCK ISSUES.

Nowhere has this tendency been more marked than in the legislation of the several states regarding stock issues of railroad corporations. It has led our lawmakers to lay too much stress on keeping down the nominal amount of stock, and too little upon getting the actual amount of capital needed and having it properly used.

Nearly all the states require that railroad stock issues should be paid in full at their face or par value. Eighteen have this provision in their constitutions; a majority of the others have more or less definite laws to the same effect. Even without such specific statute the requirement that the shareholder may be called upon to meet the full value of his stock subscription is operative in the absence of legislation to the contrary. Of such legislation there has been relatively little. West Virginia alone, among all the states, expressly sanctions the issuance of stock at less than par, although there are several others where exceptions to the rule of full payment have been allowed, either by general statute or by special act of the legislature in particular cases.

5. EVASION OF STATE LAWS.

Where the strictness of the law regarding capital stock has interfered with the building of railroads in new communities, evasion of its letter or spirit by railroad companies have been frequent. The very rigidity of the statute has caused the public to be negligent in its enforcement. In some cases the laws have been so drawn as actually to invite evasion, by specifically leaving it to the judgment of the directors to decide what constituted an adequate consideration for the shares. The companies have thus been enabled to represent that their stock was fully paid, when this was not in fact the case. Sometimes stock has been issued by the promoters

of a company to themselves as a reward for their services in organization and management. Sometimes it has been issued in exchange for rights of way and other forms of assistance to the construction of a new road, without much regard to the cash value of the consideration received. Sometimes it has been issued to stockholders to represent the increased value of their property, actual or prospective, on the theory that such value represents undivided profits which the stockholders have not received or do not receive in cash, and are therefore entitled to obtain in scrip. Sometimes it has been issued in reorganization, consolidations, or in exchange for the stock of other companies, on terms not really warranted by the facts in the case. Sometimes stock so issued as full paid has been given as a bonus to induce people to subscribe for bonds.

Besides these direct methods of evasion, there have been more indirect means of reaching the same result. Lines have been built through the agency of construction companies and paid for by the issue of securities whose face value considerably exceeded the actual cost of the roads themselves.

All these practices, with the possible exception of the one last named, have been much more frequent in the past—particularly during the great periods of railroad expansion from 1853-57, 1869-72, 1879-82—than they have been in recent years. This change is not wholly due to increased stringency in the laws. It is partly due to wise administrative measures for their enforcement, and partly to the increased demands of investors in bonds for the real data as to the security underlying them, which has compelled managers of corporations to give greater publicity as to the real facts. The Chicago & Alton reorganization is the only instance in the last decade which has been brought to our cognizance where the public has been offered a large issue of railroad stock (as distinct from the stock of a holding company), based merely upon an estimated increase of value. Recent attempts to capitalize expected profits in connection with other public service corporations or with industrials, do not come within the scope of this inquiry.

6. DANGER OF EVASION OF FEDERAL LAW.

A federal law requiring full payment of all stock issues, without special machinery to enforce it, could be evaded as state laws have been evaded in the past. In fact, the liability to evasion might be greater, because in some parts of the country a statutory requirement of this kind, imposed by the federal government, would be regarded as an interference with the rights of the several states; and local companies attempting to build new lines with stock not fully paid might have the support of local public sentiment in so doing. It is possible that in some instances the federal government could not even count upon the vigorous assistance of the state authorities themselves in trying to enforce such an Act at all rigidly. Such a federal requirement superadded to the state requirement might simply mean that every company would be led to make two deceptive returns instead of one. A federal requirement conflicting with a state requirement might leave us in an even worse case; for the impossibility of obeying both authorities would be made an excuse for obeying neither. This would clearly be true until the paramount authority of the federal government was established.

7. ENFORCED UNIFORMITY NOT YET ATTAINABLE.

To make legislation of this kind effective, it would be necessary to provide federal agencies for carrying out its requirements in detail. We should be compelled either to burden the Interstate Commerce Commission with a large amount of additional work, or to create a new commission to supervise railroad incorporation and construction in different parts of the country.

If we were ready to substitute exclusive federal control for the jurisdiction of the several states over their railroad corporations, much could be said in behalf of the establishment of a national authority to supervise both the issuance of stocks and bonds and the actual expenditure of their proceeds. But, apart from the constitutional difficulties which might stand in the way of such a procedure, your Commission is of opinion that, as a mere matter of expediency, the time is not ripe for any such immediate or forcible transfer of jurisdiction. The local needs of different parts of the country are still divergent. Many railroad problems, both of operation and of control, are still in the experimental stage. Enforced uniformity under federal law would, in the opinion of many, discriminate against the development of new territory, and the formation of independent companies; for a well established system has less difficulty in securing the necessary capital by pledging its credit than an independent projector wishing to develop a new district. These dangers and difficulties may have been somewhat exaggerated. While they undoubtedly exist in certain cases, they are of a sporadic, rather than a general, character. But they are urged with much force, both by state railroad commissioners and by independent builders; and they would constitute obstacles to the effective enforcement of a federal statute. Before such a statute is enacted, it should be clearer than it now is that public opinion would support it. Under such circumstances the immediate assertion of exclusive federal jurisdiction under one general railroad law appears unwise.

Until such exclusive jurisdiction can be established, the creation of a separate administrative body subjecting the railroads of the country to a new system of concurrent supervision, in addition to the many old ones which now exist, does not seem just, expedient or economical.

8. ENFORCED PUBLICITY IMMEDIATELY NEEDED.

In place of any added federal requirements concerning payment for capital stock, your Commission recommends the adoption of provisions regarding publicity which will show the actual facts regarding stock and bond issues in the several states, and the consideration received therefor. Any railroad doing interstate business which issues bonds or stocks should be required by statute to furnish the Interstate Commerce Commission, at the time of the issue, with a full statement of the details of the issue, the amount of the proceeds, and the purposes for which the proceeds are to be used, followed in due time by an accounting for such proceeds, as more fully hereinafter set forth.

An Act of this kind does not limit the freedom of the several states to make any kind of laws which they please regarding their own corporations. If they want them stringent they may make them stringent. If they think they can encourage the investment of capital by permitting the issue of stock for less than par, they can allow such issues. If the result of enforcing existing laws interferes with local needs, they may change the laws. But the companies must indicate precisely what they are doing. They must not attract the bondholder's money by representing that there has been a payment of one hundred cents, when there has been a payment of only fifty cents. They may, if they please, direct the treasurer to set down their partly paid stock in the balance sheet as a liability in full; but they must make it plain to the investor today and to the public tomorrow how much of that liability was represented by cash assets contributed and how much consisted of what is called in English balance sheets 'nominal additions to capital.' Such liability is of the corporation to its stockholders and not of the public to either.

9. MODE OF PROCEDURE.

Two courses lie open before us in our effort to secure publicity regarding railroad securities: Either to require the express sanction of some administrative body

(presumably the Interstate Commerce Commission) before such securities are issued, or to rely on general statutory provisions under which the directors may issue such securities and be held responsible for their proper use. In the case of either of these alternatives, the accounting required must be full and adequate in every respect, and the Interstate Commerce Commission or other administrative authority must be empowered to do whatever may be necessary in its judgment to secure compliance with the statute and to prevent injury to the public. Either alternative would involve the valuation of property and services whenever such valuation may become necessary in establishing the integrity of the financial transactions involved.

The first alternative insures reasonably full publicity before the fact. Official inquiry following the formal application would tend to discourage attempts at evasion; and would probably in many instances prevent the filing of applications for issues which are questionable either because of their financial unsoundness or because they duplicate existing lines instead of adding to public convenience.

Your Commission nevertheless prefers the second alternative and doubts the expediency under present conditions of a general law forbidding railroads to sell securities without specific authorization in advance, it being understood that the face value of these securities is not to be construed as an obligation on the public. Authorization in advance would tend to create an impression on the part of the investing public of a guaranty or official recognition of values, which no administrative authority can safely give. The absence of such recommendation by this Commission is intended to make it clear that no such guaranty should be given. A growing railroad has constant need of money, and its officers and directors are the best judges of the amount of its annual requirements. It is manifestly to the interest of the company and of the public that a road should get its money as cheaply as it can. The policy of allowing a floating debt to accumulate with a view to its extinction by the sale of permanent securities upon the completion of its improvements is not a good one, and should be avoided wherever possible. An administrative body whose approval was required in advance for the sale of securities would have great difficulty in always acting promptly enough to enable the roads to avail themselves of favorable money markets, and avoid the creation of floating debt, and might do its work so carelessly as to result in shielding the directors from responsibility, instead of acting as a safeguard to the public.

We are disposed to leave for the present to state commissions the responsibility of passing upon the questions of public convenience and necessity involved in the building of lines to be constructed within the limits of their several states, and to rely on full publicity as to the use of the proceeds of the sale of securities and of other assets as a safeguard against financial abuses.

10. FACTS TO BE DISCLOSED.

With this end in view, every company should be required to furnish to the Interstate Commerce Commission at specified dates a full statement, including the names of the parties concerned, of all financial transactions that have taken place during the periods covered by the report, whether in cash, in securities, or in other valuable considerations, and whether embraced in income account or outside of it. This statement should also include the disposition of surplus. Every company should be further required to compile for the information of its shareholders facts in regard to the financial transactions of the company for its fiscal year, of such a character and in such form as the Interstate Commerce Commission may direct.

The Interstate Commerce Commission should have the power to investigate all such financial transactions and to inquire into the bona fides thereof; the right to call for the production of books and papers of railroad companies, construction companies or other companies with which the railroad company shall have had financial transactions, for the purpose of enabling it to verify any statements so furnished to

it; and the power to examine into the actual cost as well as the value of property acquired or of services rendered. In all transactions investigated, from the purchase of supplies to the acquirement of new lines by consolidation, every interest of the directors should be disclosed, and adequate penalties provided for any failure to make such disclosure.

This enumeration is illustrative and not inclusive. Some of these items the Interstate Commerce Commission now requires in the reports of the companies; other items are not now required and probably cannot be under the present Act to Regulate Commerce. All of them call for facts or groups of facts which the Interstate Commerce Commission should be empowered to ascertain in the administration of an amendment to the Act to Regulate Commerce, concerning which we have prepared and attach to this report a more definite suggestion.

11. PHYSICAL VALUATION.

'Physical valuation' of railroads in its bearing on capitalization has been to some extent advocated, and to a greater extent opposed, upon the idea that, if undertaken by the United States Government, it will be made a justification for reducing the amount of the outstanding securities of the railroads to the figure thus ascertained, or for preventing them from issuing new securities when the amount of their outstanding stocks and bonds exceeds the physical value of their properties as so determined. Should a valuation of the physical property of railroads be made, it ought not, if properly applied, to involve either of those dangers.

An attempt to scale down old securities is clearly out of the question. Apart from the obvious constitutional difficulties of such a course, considerations of public expediency of themselves forbid it. The direct loss from the unsettlement of legal and equitable relations would be very great. The indirect loss from the withdrawal of confidence in American railroad investments would be immeasurable. Such a readjustment would become archaic almost from the outset, because an adjustment of securities based upon the values of today might be totally erroneous tomorrow. It would be equally inadvisable, in cases where outstanding securities were in excess of the physical valuation, to prohibit the issue of new securities until physical value had become equal to the amount of securities outstanding; because this principle, if generally applied, would prevent roads so situated from securing the capital needed for the service of the community.

Whenever a railroad company acquires new property in return for the issue of its securities, or in expending the proceeds of such securities, every means should be placed at the disposal of the Interstate Commerce Commission to ascertain the value of such property as accurately as possible. A fundamental, though not necessarily a controlling, element in value, is cost of reproduction. This is true of property in general; it has been specifically affirmed of railroad property by the Supreme Court of the United States. Eminent railroad men who have appeared before this Commission have stated that in their opinion cost of reproduction or physical value was the most important single element in determining the true value of the railroad as a whole. Indeed, we believe it to be in the interest of railroads, no less than of those who use them, that the Interstate Commerce Commission should be given broad powers and adequate means for valuation of the physical property of railroads as one element in determining fair value, whenever, in the judgment of that Commission, this is of sufficient importance to warrant such action. This will give the public information which it is entitled to demand, and which can, in our judgment, be better and more economically obtained in this way than in any other. The attempt to oppose a system of physical valuation of this kind tends to give countenance to exaggerated estimates of the amount of water in railroad stocks.

12. RESULTS TO BE EXPECTED.

We believe that the powers granted to the Interstate Commerce Commission by the preceding recommendations may be found large enough to protect the public, without the necessity of passing a law that should require specific approval in advance of the amount and purpose of stock and bond issues.

We do not say that the enforcement of a law of this kind will be easy. The public in all parts of the country has become accustomed to the evasion of laws concerning capital stock. It is far easier to pass a radical measure which is going to be evaded than to secure obedience to a conservative one. But we are confident that full public knowledge of the facts will diminish the evils and misunderstandings described in the opening paragraphs of this report as being the chief sources of the demand for immediate federal action, and will at the same time furnish the proper foundation on which to base more thorough-going reforms.

One of these evils was that bondholders were at times deluded into the belief that there was a security behind their bonds which did not exist, and that the railroad company was mortgaging a piece of property when it was only capitalizing an expectation. They thus entrusted the control of their money to men who had comparatively little at stake. If a profit was made, the promoters could appropriate it; if money was lost, the loss fell on the bondholders. Roads built largely with borrowed capital at the beginning have been prevented from subsequently obtaining the credit which they might otherwise command. They have therefore been less able to give to the shippers or to the travellers the facilities which are requisite no less for the convenience and safety of the public, than for the profitable utilization of the railroad itself. To the extent that we lessen debt, we shall increase the power of the roads to raise money when the public needs added facilities and shall at the same time reduce the chance of default and lessen the severity of commercial crises.

But to most people the danger of these financial consequences seems a less serious thing than the danger that the railroads will tax the users of the road for the sake of making profits on capital not actually furnished. The necessity for paying interest on bonds, and the desirability of providing for dividends on stock are sometimes urged as a justification for increased rates; and they are frequently put forward as a reason why existing rates may not fairly be interfered with by law. To meet this danger, so far as it is a real one, and to avoid this misapprehension so far as it is a misapprehension, it is essential that the stock should be what it purports to be. If it purports to represent one hundred dollars paid in on every share, one hundred dollars should actually be paid in. If it purports only to be a participation certificate, giving a proportionate interest in any profits that may be earned, it must be understood that this is its essential character, and that if it claims any further rights than this, it must prove them by specific evidence. This is in the interest of all parties—of the honest investor and the progressive manager, of the shipper, the traveller and the general public.

If full publicity be given to the facts, we shall also lessen the fraudulent creation of debt. It is the degree of publicity as to the facts, rather than the stringency of the law, which gives the people any real protection. A stringent law inadequately enforced and secretly evaded is the worst thing that can possibly be offered the public because it gives color to claims which have no foundation in fact.

13. CONFLICTS OF JURISDICTION.

While we do not think that the time is ripe for a sudden and quasi-compulsory transfer of the direct control of the stock and bond issues of interstate railroads from the states to the federal government, we cannot help recognizing that there are conflicts of jurisdiction in the construction, operation and financing of interstate rail-

roads which may more and more embarrass interstate commerce and necessitate a larger degree of federal control, or even result in federal incorporation.

A road organized by an individual state is subject to state jurisdiction regarding certain rates and facilities and purposes for which securities may be issued, and is responsible to the state courts for the performance of its functions. The instant that its cars pass across the state line or that its shipments are routed to points in other states it becomes responsible to the Interstate Commerce Commission and to the federal courts. Constitutionally Congress has paramount authority over interstate commerce and by its action can abrogate any previous action of the states which may prove inconsistent therewith. Practically it is easy to see how a conflict may arise between local and national requirements regarding facilities or methods. The state may prescribe one way of doing business; the national government may prescribe another, and forbid the one ordered by the state. It is only by the care of our railroad commissioners, state and national, that serious difficulties of this kind have been avoided in the past.

Even more perplexing are the questions which may arise in connection with the control of interstate railroad rates. The local legislatures and commissions have ideas of their own regarding rates which may differ in some respects from the ideas of Congress or of the Interstate Commerce Commission. But the relation between through and local rates is frequently so close that the two sets of things cannot be arranged on independent principles. The reasonableness of the through rate may depend upon its relation to the local rate, and vice versa. It becomes increasingly difficult each year to leave a corporation free to fix its local rates subject to the jurisdiction of state commissions and state courts only.

Thus the exercise by a state of its authority over railroads organized or operating in its territory, prescribing terms on which, and the limitations within which, it may issue securities, may directly interfere with and embarrass interstate commerce, when the issue of such securities is essential for raising funds to be applied in furnishing the necessary facilities for its interstate traffic. One or more instances of this have been brought to our attention. That they have not been more numerous is doubtless owing to the discretion and conservatism which have usually characterized the action of state commissions, such state regulation of the security issues of interstate railroads may be wise or unwise from a local point of view; but the state determination cannot control the federal right. This danger of possible interference with interstate commerce necessarily tends to increase with the number and activity of state commissions; and it was for the protection of such commerce against any interference that the power of regulation was vested in the federal government.

14. DEVELOPMENT BY INTERCORPORATE HOLDING.

Some states have laws compelling railroads within their borders to be organized under the laws of the states in which they are located and forbidding foreign corporations, so-called, from constructing, owning and operating lines thus located. The effect of these and other similar statutes have been largely avoided by a system of intercorporate holdings, under which a corporation organized in one state which owns the stock or the major part of the stock of a road in another state can secure the capital necessary for construction or betterment without subjecting itself to the restrictive laws of the state where the money is actually spent. One or two instances will show how this system works.

The state of Texas has a law which rigidly limits the extent to which roads in that state may be capitalized. It seems to have been the expectation of those who passed the Texas law that it would be a protection to all those interested in the proper operation and regulation of railroads. But it has had the practical effect of making it difficult to get directly by the sale of securities of railroads located in Texas, the necessary capital for their improvement; because if a road was already capitalized to

an amount in excess of the official valuation of the State Commission, no further securities could ordinarily be placed upon the property for necessary improvements, until this deficiency was made good. Under these circumstances companies organized in other states which own lines in Texas needing added investments of capital in order to handle their traffic in that state economically, frequently resort to a simple expedient. Instead of issuing securities of the Texas company they pledge the credit of the parent company and put into a collateral trust any hitherto unpledged securities of these Texas roads that they may have in their treasury, and if they have none, then other securities or property, thus issuing under the authority of another state securities whose proceeds are to be spent in Texas.

When the Chicago, Milwaukee & St. Paul Railroad wished to build its Puget Sound extension it had to pass through several states whose laws forbade corporations chartered under laws of other states to build roads within their borders except as a connection or prolongation of a road actually built to the state line. In order to conform to these restrictions, the St. Paul Road would have had to build its line slowly, step by step, instead of doing work in several states at once and putting the road through as promptly as possible. To avoid this difficulty it had to organize a separate company to build the road in each state which had such a law. This in itself was not a serious evil; it simply involved additional expense, to have separate corporations do things piecemeal which might have been done as a unit without such intermediaries. But it tended to render state control less effective instead of more so. The system thus forced upon the St. Paul Road would give every opportunity for deception to a road which might want to deceive.

Where a company builds its own roads, it is possible to find out what they cost and have the matter properly entered in the balance sheet; but where a corporation is artificially encouraged to divide itself into several parts, the parts that do the constructing can sell their finished roads to another part, at an abnormal profit. This transaction may furnish the parent company an excuse for an over-issue of securities. If the securities thus over-issued are paid for in full, it will put a certain amount of cash into the treasury of the newly organized company for which it becomes very difficult to hold the directors of the parent company to strict account. If they are not fully paid for, it simply means that the alleged profits of the parent company may be made the excuse for furnishing its stockholders, in the shape of a dividend payable in its own stock, a number of pieces of paper whose face value is greater than the amount actually contributed.

15. CONTROL BY INTERCORPORATE HOLDING.

Of the total amount of railroad capital outstanding on June 30, 1910, \$3,952,000,000, or more than twenty per cent of the whole, was held by railroad companies themselves. About one-third of this was bonds, and two-thirds stock. There is also a large additional amount of railroad securities owned by various 'holding companies,' which are not technically speaking, railroad corporations and do not make return of their capital to the Interstate Commerce Commission, but which control the policy and direct the operation of the roads whose securities they have purchased. Any artificial stimulus to these intercorporate holdings is a public evil. Where a railroad controls the operations of another railroad by owning a majority of its stock, or where a holding company controls the operations of several roads in the same manner, we have all the disadvantages of consolidation, without getting all of its advantages. We get the centralization of financial power; we do not get all the economy of operation which should go with it.

Apart from this general danger, we open the way to several specific evils.

Where a railroad controls the operations of another road by the ownership of a majority of its stock, there is constant danger that the minority holders will not be fairly treated. The road thus purchased has become part of a large system, and

is operated by the representatives of the whole system. It is almost certain that the advantage of the whole will be preferred to the separate interests of the part in matters of operation, traffic and finance.

Again, the existence of two or more companies under the same management, having separate organizations but united control, invites the concealment of financial transactions by the shifting of charges from one company to another. We have already shown how this may happen in the construction of a new road. It is equally possible in the operation of an old one.

16. FINANCIAL DANGERS.

A further effect of intercorporate holdings is to change contingent charges into fixed ones. A railroad company buying the stock of another company almost always issues collateral trust or other bonds to pay for it; in other words, it puts the stocks into its own treasury and sells the bonds to the public. As long as the road is prosperous this change does little harm. In fact, it may appear to do good. When a company has been able to buy a five per cent stock by the issue of its own four and a half per cent bonds, there is an apparent profit of one-half per cent annually on the transaction to the company and an apparent reduction in total charges which it must meet. But with any diminution in traffic, the bad effect of the change is at once obvious. The interest on the bonds remains a fixed charge against the company. The effect of a loss of dividends would have been felt chiefly by the individual stockholders; a default, or even a threatened default, of interest has an effect on the credit and confidence of the country as a whole, and may precipitate a financial crisis.

The extent to which the credit of our railroads is being pledged is evidenced by the change in the proportion of railroad stocks and bonds held by the public. In 1899 these were nearly equal; \$4,307,000,000 stocks and \$4,336,000,000 bonds. Eleven years later the figures given by the statistician of the Interstate Commerce Commission were \$5,578,000,000 stocks and \$8,865,000,000 bonds—a serious disproportion. The growth of intercorporate holdings is responsible for a considerable part of this change. This disproportionate growth of fixed interest-bearing obligations as compared with stock is primarily the result of the issuance of bonds in payment of roads acquired, and would still have taken place even if title had been taken in fee instead of through stock ownership; but the latter method, by reason of its facility for the issue of collateral trust bonds, has unquestionably been an important factor in creating this disproportion.

So long as different parts of what is naturally a connected system of railroads are chartered by separate states there are likely to be artificial obstacles to consolidation; and while these obstacles exist, we shall find it difficult either to check the tendency toward increased intercorporate holdings, or to deal with the evils incident thereto. Each instance of intercorporate holdings thus furnishes an added argument for federal charters.

17. ALTERNATIVE METHODS.

In the present state of the law, there are two distinct methods by which we might avoid conflicts between the state and federal governments in the control of railroad stock and bond issues, and deal with the problems of construction and finance incident thereto.

One method relies on a full interchange of views between the Interstate Commerce Commission and the commissions of the several states, as a means of securing harmony. If it is possible for the members of all these different bodies to arrive at a common understanding on a question of public policy, they usually have little trouble in getting the necessary authority from Congress and the state legislatures to put a consistent policy into effect. This way of doing things was illustrated in

the legislation regarding safety appliances a few years ago; it is just being illustrated in connection with control of railroad accounts to-day. In each of these matters a great deal of trouble was made by conflicting requirements; in each, a full discussion of the questions involved was followed by a substantial agreement on the main points, and the good sense of the several commissions prevented serious difficulties from being raised about minor ones.

Whether we could secure a similar agreement on matters of finance, where the conflict of interest between different localities is more serious and the differences of opinion are more fundamental, is open to doubt.

If the public interest of the United States as a whole should be jeopardized by these differences, we can perhaps have recourse to a Federal Incorporation Act, which shall permit railroads to exchange their state charters for federal ones. We believe that such an Act could be so drawn as to offer advantages in the conduct of interstate traffic without unduly conflicting with local interests. The most important of these advantages would be: (1) The right to construct lines needed for interstate commerce, under proper local supervision, and with proper regard for local needs, but without the agency of local corporate organizations; (2) The right to have rates supervised by a single authority which could pay proper regard to the mutual relations of local traffic and interstate traffic, instead of two separate authorities dealing with the two things independently; (3) An equitable system of taxation which would distribute to the several states their proportionate parts of taxes levied on both the tangible and intangible property of the railroad by some harmonious plan.

It is too early to make definite choice between these two alternatives. But it is not too early to indicate the principles which should guide our legislation concerning stocks and bonds in either event, for our progress towards putting these principles into effect will necessarily be slow by either method. If we try to bring the views of different legislatures into harmony, the discussion must be deliberate in order to have any chance of success. If we rely on permission to exchange state charters for federal ones, we must give both the railroads and the states time to learn the wisdom of availing themselves of this opportunity.

If in the discussion that follows we have seemed to have more definitely in mind the adoption of a federal charter than federal control of state corporations, it is because this method enables us to make our suggestions in clearer and more concrete shape; the underlying principles and aims would be substantially the same in the two cases.

18. TREATMENT OF EXISTING ISSUES.

Whatever alternative we adopt, any disturbance but a voluntary one of the existing amounts or status of bonds or stocks validly issued is clearly inadmissible; and in general there should be as little disturbance as possible of the relations to-day existing between different classes of security holders. These relations often seem unnecessarily complicated, both in their provisions regarding distribution of income and in their delegation of voting powers. But the confusion and litigation which would result from the attempt to disturb them would outweigh any possible good to be obtained.

The absence of any attempt to base security issues upon revaluation will emphasize the true character of our American railroad stocks, as being essentially participation certificates giving a right to a proportionate share of whatever profits may be earned, rather than evidences that a certain specific amount of money has actually been invested in the property.

19. PRICE OF NEW ISSUES OF STOCK.

A most important and difficult question is that of the price at which new stock may be issued. We believe that no restrictions except those of publicity should be

placed upon the power of the directors to issue new stock pro rata to their stockholders at or above par, even though the price received be less than the existing market value of the old stock. The experience of Massachusetts has shown that the attempt to prohibit the issue of stock below its market value has hampered the investment of capital and has distinctly interfered with the development of facilities. If this has been the experience of Massachusetts, where capital was abundant, we can hardly expect better results in states where capital is more scarce.

A further objection to any attempt to compel the sale of new stock at a price above par is that it implies a certain warrant that this value, thus publicly fixed, will be maintained in the future, on the old stock as well as the new. In thus attempting to limit profits, it may actually tend to guarantee them.

The question whether the directors should be allowed to issue stock below par is a harder one to answer. On the face of the matter it seems as though the requirement that no stock should be sold at less than par was a fundamental principle of sound finance. So it is, if it results in the sale of stock at par; not so, if it results in the sale of bonds at a discount. If a road whose stock, for any reason whatsoever, sells below par is prohibited from issuing stock at less than par, it means that it must raise all its money by bonds. It is compelled to go more and more deeply into debt. The worse the financial position of the road, the stronger is the compulsion and the heavier are the interest charges on the bond. To compel the weaker roads to pursue their present policy of issuing fixed interest-bearing obligations by reason of their inability to sell stock, at par may before long, by reason of a large crop of receiver-ships, result in intensifying the acuteness of the next panic and in prolonging the subsequent business depression.

If the stock bears upon its face the statement that each share represents a contribution of one hundred dollars or any other specified sum which constitutes its par value, we see no easy way of avoiding this difficulty. If a document says one hundred dollars has been paid, one hundred dollars ought to be paid. The most that can properly be done is to allow companies which cannot sell such stock at par to arrange for the 'amortization,' or gradual cancellation, of any necessary discount by appropriating out of future income or surplus which may accrue subsequent to the issue of such stock an annual sum having precedence over dividend payment, to be so applied on capital account as to make the deficiency good in a period of no very great length. If proper provision is made for thus cancelling or amortizing this deficiency, such stock may properly be made, by general law, non-assessable. The reluctance of directors to impair their ability to pay dividends for a term of years will prevent the abuse of this power. We believe the issue of stock at a discount, under safeguards like these, to be far preferable, in the interest of the public, to the sale of bonds at a high rate of interest, or what amounts to the same thing, at a large discount.

20. SHARES WITHOUT PAR VALUE.

We do not believe that the retention of the hundred dollar mark, or any other dollar mark, upon the face of the share of stock, is of essential importance. We are ready to recommend that the law should encourage the creation of companies whose shares have no par value, and permit existing companies to change their stock into shares without par value whenever their convenience requires it. After such conversion any new shares could be sold at such price as was deemed desirable by the board of directors, with the requirement of publicity as to the proceeds of the sale of such shares and as to the disposition thereof; giving to the old shareholders, except in some cases of reorganization or consolidation, prior rights to subscribe pro rata, if they so desired in proportion to the amount of their holdings.

As between the two alternatives of permitting the issue of stock below par, or authorizing the creation of shares without par value, the latter seems to this Commission the preferable one. It is true that it will be less easy to introduce than the

other, because it is less in accord with existing business habits and usages; but it has the cardinal merit of accuracy. It makes no claims that the share thus issued is anything more than a participation certificate.

The objections to the creation of shares without par value are two in number: First, that their issue will permit inflation, by making it easy to create an excessive number of shares; and second, that it will produce a division of roads into two classes, those whose shares have a par value and those whose shares have not. The second of these objections does not appear to be a very serious one. There are listed on the stock exchanges to-day, side by side with one another, shares of the par value of one hundred dollars, shares of the par value of fifty dollars, shares with very much smaller par value, and a few, like the Great Northern Ore Certificates, with no par value at all. The share sells in each case simply for what the public supposes it to be worth as a share. The danger of inflation deserves more serious consideration. We believe, however, that it is more apparent than real, because shareholders will be jealous of permitting other shareholders to acquire shares in the association except at full market value, and will not permit the issue of such shares to themselves at prices so low as seriously to impair the market or other value of their holdings. Shares either with or without par value, and whether sold at par or above par or below it should, except in cases of consolidation and reorganization, be offered in the first instance to existing shareholders *pro rata*.

The issue of stock without par value offers special facilities for consolidation and reorganization.

Where two roads have consolidated whose shares have different market values, it has been the custom to equalize the difference by the issue of extra shares of the consolidated company to the owners of the higher priced stock. This practice has always tended to produce increase of capital issues, and may readily cause the new stock to be issued for a consideration less than its par value. The only alternative was to scale down some of the old stocks; and this often involved serious difficulties, both of business policy and of law. By the simple expedient of omitting the dollar mark from the new shares, the number can be adjusted to the demands of financial convenience, without danger of misrepresentation or suspicion of unfairness to anyone.

In the case of reorganizations, the advantage of shares without par value is even more obvious. It is here that the necessity and justice of getting money from stockholders is greatest. It is here that the impossibility of getting them to pay par for new shares is most conspicuous. We believe that in such cases the public interest would be subserved and the speedy rehabilitation of the roads promoted, by requiring the conversion of the common stock and encouraging the conversion of the preferred stock into shares without par value; the certificates simply indicating the proportionate or preferential claims of the holders upon assets and upon such profits as might from time to time be earned.

All of these considerations seem to apply with equal force to the securities of railroads under state incorporations, and we believe the laws of the several states could with advantage be modified so as to provide for the issuance of stock without par value.

21. NEW ISSUES OF BONDS.

It seems to be generally agreed that no limitation should be placed on the price at which bonds can be sold, but any discount should be cancelled or amortized during the life of the bonds by the appropriation each year, out of annual income or surplus accumulated after the issue of the bonds, of not less than the proportionate amount of the discount. In the case of convertible bonds, the same provision should hold good, with the additional restriction that after conversion the laws governing the amortization of discount on stock sold below par should apply also to the unamortized discount on convertible bonds. While the convertible bonds themselves may be

sold below par, the conversion price of the stock should equal its face value; except of course in case of shares without par value, where no limit as to conversion price is necessary, nor any amortization after conversion. The premium on bonds redeemed before maturity or the unamortized discount on bonds thus redeemed should be charged to profit and loss, and provision made for the gradual cancellation of this charge out of income.

Issues of convertible bonds should be offered to stockholders pro rata, in the same manner as stock itself, to the extent to which they may choose to avail themselves of the privilege of subscription.

22. DIVIDENDS AND RESERVE FUNDS.

No attempt should be made by statute to limit railroad profits to a fixed percentage, or to treat a high cash dividend as necessarily indicating extortion. Railroad charges must be reasonable; but to try to control rates by arbitrarily limiting profits is to put the manager who makes his profit by efficiency and economy on the same level as the one who tries to accomplish the same result through extortionate charges.

Scrip, bond and stock dividends should be prohibited. They are commonly justified on the theory that the company has in times past put earnings into the property which it might have divided among the stockholders, and that the scrip dividend merely reimburses the stockholders for what they have put into the road. But these sums were put in, either to make depreciation and obsolescence good, or as actual additions to the property. In the former case the capital account ought not to be increased. In the latter case any such increase gives color to the claim that the shippers have been taxed to pay for the improvement of the property, and that the stockholders have appropriated the result.

Many of the stock dividends in past years have represented an increase in the value of the property, not paid for either by investors or by shippers, but due simply to the foresight of the management in locating and organizing its business wisely. Under these circumstances a stock dividend to represent this increased value may possibly have been justified, but it is far better to let the increased value be shown by a higher rate of dividend on the existing shares of stock, instead of by an addition to their nominal amount.

If we prohibit scrip dividends, we can permit the creation of proper reserve funds without having them regarded with suspicion as being a pretext for future issues of unpaid stock. Sound finance demands that the companies should set aside such funds, out of income, to 'defray the cost of progress.' They can thus provide against obsolescence, or make improvements which add nothing to the earning capacity of the property and ought not therefore to be made the basis of increased capital liability.

Failure to encourage the creation of reserve funds out of surplus earnings would cause a constant increase of fixed charges, already heavy enough. Whatever gain there might be in a present lowering of rates would be merely temporary. Investors and shippers would alike be misled; the former into a fancied security as to the permanence of dividends, the latter into the belief that such reduction in rates was permanent. Ultimately such a course would lead either to higher rates or to steadily diminishing dividends and consequent impaired credit. Railroad credit is an important asset to the entire country, and it should not be wasted. In encouraging therefore, the creation of reserve funds, we are only suggesting that the present generation shall not be unmindful of its obligations to future users of transportation.

Cash dividends are not likely to be as large as scrip dividends, because the former involve the distribution of a corresponding amount of cash, while the latter do not. Under these circumstances the prohibition of scrip dividends should of itself encourage the creation of proper reserve funds. In this as in other respects, all these three proposals—freedom from arbitrary restriction of profits, prohibition of scrip divi-

dends, and creation of proper reserve funds—hang closely together. Any one by itself may be of doubtful value. Taken together, they should produce a result advantageous to all.

23. TREATMENT OF INTERCORPORATE HOLDINGS.

Whatever may be the evils due to such holdings, an unqualified prohibition of the ownership of stock of one road by another involves too much disturbance of existing relations to warrant us in advocating it. Much will be accomplished if we do away with the unnecessary extension of these holdings and provide for equitable dealings between the representatives of the purchasing company on the one hand and the holders of minority interests on the other.

If a railroad company is allowed to build the necessary lines into other states for the handling of interstate business, instead of being compelled to create some separate company to do this, one fruitful reason for intercorporate holdings will be done away with. If we have full requirements of publicity regarding the purchase of stock of other companies, and have the disclosure of directors' interests therein, another source of danger is avoided. If, finally, we can remove artificial obstacles to consolidation by permitting the issue of shares without par value, we shall be able to avoid the expense of double corporate organization where a single company would better serve public economy and convenience. In this and other respects, many of our difficulties are due to the attempt to rely upon competition in a business which, in private hands, should be treated in essentials as a regulated monopoly.

Any company, or group of companies, which has purchased a majority of the stock of any existing road may properly be required to buy the minority stock at the same price as that paid for the majority stock where the price has been uniform. If the price has not been uniform, the purchase should be either at the average price paid for such holdings or at a price to be fixed by appraisal, at the option of the minority stockholders.

If a company has acquired control of the common stock of another, but not of its preferred, it should be required either to buy the preferred stock or to make the preference cumulative, for the continued existence of a non-cumulative preference under such conditions will offer constant temptations to unfair dealing, if not to actual fraud.

In order to avoid vexatious opposition to consolidation by a minority it should be possible, after such an offer had been fairly made, to convey the property by three-fourths vote of the shareholders and dissolve the corporation. The purchase of less than a majority of the stock of one line by another (except as one of a group of railroads jointly holding the stock of some connecting company) should be discountenanced and as far as possible prohibited. What we have here said applies only to intercorporate holdings arising out of railroad affiliations permissible under existing statutes and not in conflict with declared principles of public policy.

24. REASONABLE AND UNREASONABLE EXPECTATIONS.

An agreement on these lines will enable us to avoid many existing conflicts of jurisdiction, and will incidentally promote honest and responsible management of our railroads in every department. So far as it does this, it will be a good thing both for investors and for shippers. But the extent to which a law regarding security issues, however well drawn, can protect either the investor or the shipper is quite limited.

Most of those who advocate legislation on this subject hope for wider results than can possibly be reached by any such means. One man expects that a good law on stock and bond issues will be of great service in enabling courts and commissions to protect the shippers against overcharge. A second believes that both investors and shippers can be benefited by an abolition of the profits of the promoter. A third thinks that our securities can be standardized, so that the investors will be sure of getting

the returns which are promised them. A fourth demands that public confidence be so restored that the community may get the railroad capital it requires. The attainment of these results is beyond the power of an Act of Congress. The chief thing that such an Act can do is to remove obstacles which bad laws and worse practices have placed in our way.

The attempt to render direct protection to the shipper by a federal statute regarding stock and bond issues is attended with difficulties which are almost insuperable.

In the case of *Smyth vs Ames* the Supreme Court of the United States held that the amount of bonds and stocks outstanding was but one among many matters to be considered in deciding whether rates were reasonable. This therefore is the law as determined by precedent; and it is fortunate that the dictates of precedent coincide with those of business sense. The attempt to make the face value of securities issued, the determining factor in rates would result in putting a premium on roads which had been speculatively, not to say dishonestly, built or managed, by allowing them to charge higher rates on account of the inflated capital thus produced. And, wholly apart from any such speculation or dishonesty, the amount of stock capital and bonded debt, even if paid for a par, is a very inaccurate and incomplete criterion of the value of the property devoted by its owners to public use. It has at best only a historical importance, as showing what property was or purported to be worth at the time of the incorporation. It does not show what it is worth, or what rates may properly be charged for its use, ten years later or even one year later.

25. PROMOTERS' PROFITS AND SERVICES.

We are told that the profit of the promoter represents a wholly unnecessary burden upon the American public, and that so far as this profit can be done away with, it will be good for all parties. Neither of these statements is quite true. The promoters, using the term in a broad sense, may be divided into two classes: constructors who build a road whose future is uncertain, in the expectation of selling the stock for more than it cost them; and financiers who induce the public to buy the bonds of such roads. Both of these classes, if they do their work honestly, render useful services to the public. The constructor gives our undeveloped districts the benefit of new roads, which they would not get without his intervention; and if he does his business well he builds the roads more economically than anybody else could. The financier renders an equally important service in collecting the capital of the investors to build new railroads or improve old ones. On the Continent of Europe this is done by the banks. The great banking concerns of Germany use a very considerable part of their deposits in carrying industrial enterprises during their initial stages before their merits have been demonstrated, and then disposing of them to the actual investor at a profit in order to set their capital free for the floating of new concerns. But in the United States the power of the banks to do this is limited by law and by custom; and so far as they either cannot or do not, it must be done by financial houses especially organized for the purpose.

Our American system undoubtedly involves grave possibilities of fraud. The man who is constructing a road is tempted to persuade people to loan him money on inadequate security. The financiers may be tempted to wink at this deception. Worst of all, the roads thus built may be built for sale at an inflated valuation. The promoter may obtain his profit, not from the legitimate increase of the value of his property, but from his power to persuade the management of some larger system to buy the branch road for more than it is really worth. These are evils which publicity would do much to check. Where there is no fraud, the promoter renders a service for which he is entitled to fair remuneration.

26. STANDARDIZATION OF RAILROAD SECURITIES.

We are told that if it was possible to standardize food by a pure food law, it ought to be possible to standardize railroad securities by a securities law. It is pos-

sible—to the same extent and no more. The pure food law enables a man to know what he is buying. It does not certify that the thing he buys is good for him. That is left to his intelligence. The government cannot protect the investors against the consequences of their un wisdom in buying unprofitable bonds, any more than it can protect the consumers against the consequences of their un wisdom in eating indigestible food. Unless we are prepared to have government guarantees of interest on railroad investments—a most questionable proposal—the only way in which we can standardize railroad mortgages is the one which we use with savings bank mortgages. We can insist on double security. We can say that at least half the capital of a railroad must be subscribed by stockholders, and that not more than half may be raised by borrowing—a difficult requirement under existing conditions. Until we are prepared to pass some law of this kind the investor must depend upon his own intelligence to protect him from loss. The function of the government is to see that correct information is available.

27. RESTORATION OF PUBLIC CONFIDENCE.

There was a time when the efforts of the banking authorities in most of the states were directed toward getting the discount rates as low as possible. The bank commissioners in those days regarded themselves as the representatives of the merchants who wanted loans. They made little or no attempt to safeguard the stockholders and creditors of the bank. Those were the days of wildcat banking. The country has passed beyond that period—not solely or primarily because it obtained a national banking law, but because it administered that law with due regard to the security of the stockholders and creditors of the bank as well as its customers. We have not developed our ideas of railroad management as far as we have developed our ideas of bank management. The subject is a more complex one. The apparent conflict of interests between the management and the customers is greater with a railroad than with a bank. As a result of this misunderstanding, the necessary development of railroad facilities is now endangered by the reluctance of investors to purchase new issues of railroad securities in the amounts required. This reluctance is likely to continue until the American public understands the essential community of interest between shipper and investor and the folly of attempting to protect the one by taking away the rewards of good management from the other.

We are told that a good law regarding national incorporation would of itself create public confidence. This is an over-statement. Such a law would remove one set of sources of distrust, but there is another set, more fundamental, which can only be removed by the exercise of intelligence on the part of the American people as a whole.

28. AMOUNT OF ADDITIONAL CAPITAL REQUIRED.

There is a widespread belief, based on imperfect examination of the evidence, that the amount of capital needed for the future development of our railroad system is small in proportion to that which has been required in the past; that the profits on such added investments of capital are reasonably well assured; and that we can therefore fix attention predominantly if not exclusively on the needs of the shipper without interfering with the necessary supply of new money from the investors.

It is quite possible that the building of additional railroad mileage will be far less rapid in the future than it has been in the past, but the capital needed for the development and the improvement of the mileage already existing is enormous, even if we built no new mileage at all. The outstanding stock and debt of the railways in the United States averages less than \$60,000 a mile of line. This figure is bound to be greatly increased in the immediate future. As our population grows denser, we shall need more and more to approximate European standards of construction by

the increased amount of double track, the abolition of grade crossings, the development of station facilities both for passengers and for freight, and many other improvements scarcely less fundamental. While our railroads are perhaps even better equipped than those of Europe for the economical handling of large masses of long distance freight, they are far from being adequately provided with appliances to secure the convenience of the public or the safety of passengers and employees. The cost of all these things is very great. The average capitalization per mile of railroads in Germany is \$109,000, in France \$137,000, in Belgium \$177,000, in Great Britain \$265,000; and, contrary to the commonly received opinion, much of this excess of cost as compared with American roads, is due to other causes than the price of real estate—an item in which our companies have had a great advantage. The cost of European roads has been largely due to improvements which we have not yet made and many of which we must make in the future as population grows denser. The thousands of millions of dollars needed for these purposes must be raised by the sale of securities.

29. PRESENT RETURN AND FUTURE SECURITY.

Neither the rate of return actually received on the par value of American railroad bonds and stocks today, nor the security which can be offered for additional railroad investments in the future, will make it easy to raise the needed amount of capital.

The ratio of interest and dividends to outstanding bonds and stocks of American railroads is not quite four and a half per cent in each case. The average ratio of dividends to the capital of national banks is between ten and eleven per cent. If it be objected that the value of the stocks of our railroads is in considerable measure due to the growth of the community rather than to the cash originally invested, and that the bonds and stocks of railroads should therefore be compared with the combined capital and surplus of the national banks, we find that these banks have for the last three years maintained an average ratio of dividends to capital and surplus combined of over six and a half per cent. If we look not at the sums divided, but at the sums earned, we find the same difference of profit in favour of the banks.

Nor can the security which most of our railroads offer be regarded as exceptional. The underlying bonds of the older systems are doubtless secure. It is not probable that even a grave commercial crisis will affect the return of a trunk line first mortgage. But very little of the new capital can be raised on securities of this kind. Most of it must come either from bonds which will not be a first lien for many years, or from new issues of capital stock. The investors in these securities, and especially in stocks, take risks which cannot be accurately forecast. Apart from probable fluctuations in traffic and possible increases in cost of operation, new inventions may at any time render much of their present plant antiquated. The substitution of electricity for steam is but a type of the many changes which railroads may be compelled to make, any one of which might involve large additions to their cost without the assurance of corresponding additions to their return.

30. WHAT CONSTITUTES A REASONABLE RETURN.

We hear much about a reasonable return on capital. A reasonable return is one which under honest accounting and responsible management will attract the amount of investors money needed for the development of our railroad facilities. More than this is an unnecessary public burden. Less than this means a check to railroad construction and to the development of traffic. Where the investment is secure, a reasonable return is a rate which approximates the rate of interest which prevails in other lines of industry. Where the future is uncertain the investor demands, and is justified in demanding, a chance of added profit to compensate for his risk. We

can not secure the immense amount of capital needed unless we make profits and risks commensurate. If rates are going to be reduced whenever dividends exceed current rates of interest, investors will seek other fields where the hazard is less or the opportunity greater. In no event can we expect railroads to be developed merely to pay their owners such a return as they could have obtained by the purchase of investment securities which do not involve the hazards of construction or the risks of operation.

31. POINTS TO BE EMPHASIZED.

In concluding its report your Commission desires to emphasize the following points:

1st. The questions presented for its consideration do not include or involve a comparison of the policy of governmental ownership of railroads, with the policy of private ownership in any of its forms. The Act of Congress under which the Commission was appointed provides that its duty shall be 'to investigate questions pertaining to the issuance of stocks and bonds by railroad corporations, subject to the provisions of the Act to regulate commerce, and the power of Congress to regulate or affect the same.' The Commission has, therefore, concerned itself exclusively with questions which arise under a system of governmental regulation of privately owned railroads.

2nd. It has not seemed to the Commission profitable to consider at length what the government might have done in times past, nor to enter upon a historical recital of incidents arising out of the unregulated issue of securities. Railroad development has gone so far and such a vast volume of securities has already been issued, that the only questions of real importance today are whether, under the conditions which now exist, it is desirable for the federal government to regulate the issue of future securities, and if so, to what extent and in what manner. In other words, the large volume and complex relationships of the outstanding securities, the issue of which has not been regulated at all by the federal government and has not been effectively regulated by the state governments, make it impossible to treat the question of present or future regulation as it might have been treated if these securities were not already in existence.

3rd. It would have been equally unprofitable for the Commission to enter upon an elaborate discussion of the power of Congress to regulate or affect railroad securities, at a time when important cases are pending which will go far to determine the scope and extent of federal authority in this and other closely related subjects. Such a discussion could only state the opinion of the members of the Commission regarding the constitutional power of Congress. The issues themselves will remain undecided until the Supreme Court decides them. Whatever may be the ultimate outcome, the present fact which faces us is that constitutional questions of far-reaching consequence are to-day unsettled and must remain so for a considerable time. Under these circumstances, any attempt by Congress to adopt the policy of Federal regulation to the exclusion of state regulation, would be premature. On the other hand, to superimpose Federal regulation upon state regulation would add to conflicts and complexities which, in the public interest, should be diminished rather than increased. Your Commission believes that for the present an earnest effort should be made on the part of state authorities to harmonize existing requirements, both of law and procedure, and that for the future careful consideration should be given by Congress to the preparation of a permissive federal incorporation act for railroads engaged in interstate commerce.

4th. Many, if not most, of the abuses connected with railroad securities arise out of an almost universal failure to recognize the distinctions which exist and should exist between bonds and stocks. A bond is an obligation to pay a fixed sum of money at a stated time. A stock certificate is merely the evidence of ownership of a share in the property, profits, and risks of a corporation. Most of the evils of which investors

and the public complain have grown out of the attempt to give to stock a face value in terms of money. Even if the state laws prohibiting the issue of stocks for less than par were literally enforced all that the recitals on the face of a fully paid share of stock as to its par or money value would signify is that at the time of the issuance of the share there had been paid into the corporation an amount of money (or other valuable consideration) equal to the par value of the share. They do not even purport to indicate that at any time after the original issue of the stock the corporation was possessed either of the money or the money's worth. The real value of the stock certificate depends upon the manner in which the money has been invested. The Commission is, therefore, of the opinion that it is far more important to ascertain just what are the facts connected with the issue of securities and what is actually done with whatever money has in fact been realized from the stock which is issued, than merely to make sure that the par value of the stock was paid in at the time of issue.

5th. If we were compelled to assume that rates are to be materially influenced either in their making by the railroads or in their regulation by the Government by the amount and face value of the stocks and bonds outstanding, it seems to your Commission impossible to escape the conclusion that these securities should be issued only under Governmental regulation. Your Commission, however, believes that the amount and face value of outstanding securities has only an indirect effect upon the actual making of rates and that it should have little if any weight in their regulation.

In so far as the value of the property is an element in rate regulation the outstanding securities are of so little evidentiary weight that it would probably be of distinct advantage if courts and commissions would disregard them entirely, except as a part of the financial history of the property, and would insist upon direct evidence of the actual money invested and of the present value of the properties. For this and other reasons discussed in the body of the report, your Commission recommends that the Interstate Commerce Commission should have authority and adequate funds to make a valuation of the physical property of railroads wherever the question of the present value of these roads is, in the judgment of that Commission, of sufficient importance. It is hardly necessary to add that your Commission does not believe that the cost of reproduction of the physical properties, however carefully computed, is the sole element to be considered in determining the present value of a railroad, or that the outstanding securities could or should be made to conform to any such arbitrary standard.

If railroad securities were to be issued only after express authorization of each particular issue by the Interstate Commerce Commission or other governmental agency, it is difficult to see how the Government can thereafter escape the moral, if not the legal, obligation to recognize these securities in the regulation of railroad rates. In view of the vast extent of the railroad systems of this country and the magnitude of the financial interests involved, both on the part of the railroads and of those who pay the rates, your Commission believes that the possible consequences of such a system of regulation are too serious to warrant its adoption at the present time.

6th. Upon the whole, your Commission believes that accurate knowledge of the facts concerning the issue of securities and the expenditure of their proceeds is the matter of most importance. It is the one thing on which the Federal government can effectively insist to-day; it is the fundamental thing which must serve as a basis for whatever additional regulation may be desirable in the future.

Respectfully submitted.

ARTHUR T. HADLEY, *Chairman*.
FREDERICK N. JUDSON.
FREDERICK STRAUSS.
WALTER L. FISHER.
BALTHASAR H. MEYER.

APPENDIX N.

EXTRACTS FROM THE CONSTITUTION OF THE STATE OF ARIZONA.

ARTICLE XIV.

CORPORATIONS OTHER THAN MUNICIPAL.

Sec. 1. The term 'corporation,' as used in this Article, shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or co-partnerships, and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons.

Sec. 2. Corporations may be formed under general laws, but shall not be created by special Acts. Laws relating to corporations may be altered, amended, or repealed at any time, and all corporations doing business in this State may, as to such business, be regulated, limited, and restrained by law.

Sec. 3. All existing charters under which a bona fide organization shall not have taken place and business commenced in good faith within six months from the time of the approval of this Constitution shall thereafter have no validity.

Sec. 4. No corporation shall engage in any business other than that expressly authorized in its charter or by the law under which it may have been or may hereafter be organized.

Sec. 5. No corporation organized outside of the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law for similar corporations organized under the laws of this State; and no foreign corporation shall be permitted to transact business within this State unless said foreign corporation is by the laws of the country, State or Territory under which it is formed permitted to transact a like business in such country, State, or Territory.

Sec. 6. No corporation shall issue stock, except to bona fide subscribers therefor or their assignees; nor shall any corporation issue any bond, or other obligation, for the payment of money except for money or property received or for labour done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock of any corporation without the consent of the person or persons holding the larger amount in value of the stock of such corporation, nor without due notice of the proposed increase having been given as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.

Sec. 7. No corporation shall lease or alienate any franchise so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor, or grantor, lessee, or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or of any of its privileges.

Sec. 8. No domestic or foreign corporation shall do any business in this State without having filed its articles of incorporation or a certified copy thereof with the Corporation Commission, and without having one or more known places of business and an authorized agent, or agents, in the State upon whom process may be served. Suit may be maintained against a foreign corporation in the county where an agent

of such corporation may be found, or in the county where the cause of action may arise.

Sec. 9. The right of exercising eminent domain shall never be so abridged or construed as to prevent the State from taking the property and the franchises of incorporated companies and subjecting them to public use the same as the property of individuals.

Sec. 10. In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as he shall be entitled to vote in said company under its charter multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more such candidates; and such directors or managers shall not be elected otherwise

Sec. 13. No persons acting as a corporation under the laws of Arizona shall be permitted to set up, or rely upon, the want of a legal organization as a defence to any action which may be brought against them as a corporation, nor shall any person or persons who may be sued on a contract now or hereafter made with such corporation, or sued for any injury now or hereafter done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his or their defence.

Sec. 14. This Article shall not be construed to deny the right of the legislative power to impose other conditions upon corporations than those herein contained.

Sec. 15. Monopolies and trusts shall never be allowed in this State, and no incorporated company, co-partnership, or association of persons in this State shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders or with any co-partnership or association of persons, or, in any manner whatever, to fix the prices, limit the production, or regulate the transportation of any product or commodity. The Legislature shall enact laws for the enforcement of this Section by adequate penalties, and in the case of incorporated companies, if necessary for that purpose, may, as a penalty declare a forfeiture of their franchises.

Sec. 17. Provision shall be made by law for the payment of a fee to the State by every domestic corporation, upon the grant, amendment, or extension of its charter, and by every foreign corporation upon its obtaining a license to do business in this State; and also for the payment, by every domestic corporation and foreign corporation doing business in this State, of an annual registration fee of not less than ten dollars, which fee shall be paid irrespective of any specific license or other tax imposed by law upon such company for the privilege of carrying on its business in this State, or upon its franchise or property; and for the making by every such corporation, at the time of paying such fee, of such report to the Corporation Commission of the status, business, or condition of, such corporation, as may be prescribed by law. No foreign corporation shall have authority to do business in this State, until it shall have obtained from the Corporation Commission a license to do business in the State, upon such terms as may be prescribed by law. The Legislature may relieve any purely charitable, social, fraternal, benevolent, or religious institution from the payment of such annual registration fee.

Sec. 18. It shall be unlawful for any corporation, organized or doing business in this State, to make any contribution of money or anything of value for the purpose of influencing any election or official action.

Sec. 19. Suitable penalties shall be prescribed by law for the violation of any of the provisions of this Article.

ARTICLE XV.

THE CORPORATION COMMISSION.

Sec. 1. A Corporation Commission is hereby created to be composed of three persons, who shall be elected at the general election to be held under the provisions of the Enabling Act approved June 20, 1910, and whose term of office shall be co-terminous with that of the Governor of the State elected at the same time, and who shall maintain their chief office, and reside, at the State Capital. At the first general State election held under this Constitution at which a Governor is voted for, three commissioners shall be elected who shall, from and after the first Monday in January next succeeding said election, hold office as follows:

The one receiving the highest number of votes shall serve six years, and the one receiving the second highest number of votes shall serve four years, and the one receiving the third highest number of votes shall serve two years. And one commissioner shall be elected every two years thereafter. In case of vacancy in said office, the Governor shall appoint a commissioner to fill such vacancy. Such appointed commissioner shall fill such vacancy until a commissioner shall be elected at a general election as provided by law, and shall qualify. The qualifications of commissioners may be prescribed by law.

Sec. 2. All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

Sec. 3. The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations: Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein including the regulation of rates and charges to be made and collected by such corporations: Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said Corporation Commission may from time to time be amended or repealed by such Commission.

Sec. 4. The Corporation Commission, and the several members thereof, shall have power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public, and of any public service corporation doing business within the State, and for the purpose of the Commission, and of the several members thereof, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the State. Said Commission shall have power to take testimony under commission or deposition either within or without the State.

Sec. 5. The Corporation Commission shall have the sole power to issue certificates of incorporation to companies organizing under the laws of this State, and

to issue licenses to foreign corporations to do business in this State, as may be prescribed by law.

Sec. 6. The law-making power may enlarge the powers and extend the duties of the Corporation Commission, and may prescribe rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provided by law, the Commission may make rules and regulations to govern such proceedings.

Sec. 7. Every public service corporation organized or authorized under the laws of the State to do any transportation or transmission business within the State shall have the right to construct and operate lines connecting any points within the State, and to connect at the State boundaries with like lines; and every such corporation shall have the right with any of its lines to cross, intersect, or connect with, any lines of any other public service corporation.

Sec. 8. Every public service corporation doing a transportation business within the State shall receive and transport, without delay or discrimination, cars loaded or empty, property, or passengers delivered to it by any other public service corporation doing a similar business, and deliver cars, loaded or empty, without delay or discrimination, to other transportation corporations, under such regulations as shall be prescribed by the Corporation Commission, or by law.

Sec. 9. Every public service corporation engaged in the business of transmitting messages for profit shall receive and transmit, without delay or discrimination, any messages delivered to it by any other public service corporation engaged in the business of transmitting messages for profit, and shall, with its lines, make physical connection with the lines of any public service corporation engaged in the business of transmitting messages for profit, under such rules and regulations as shall be prescribed by the Corporation Commission, or by law: Provided, that such public service corporations shall deliver messages to other such corporations, without delay or discrimination, under such rules and regulations as shall be prescribed by the Corporation Commission, or by law.

Sec. 10. Railways heretofore constructed, or that may hereafter be constructed, in this State, are hereby declared public highways, and all railroad, car, express, electric, transmission, telegraph, telephone, or pipe line corporations, for the transportation of persons, or of electricity, messages, water, oil, or other property for profit, are declared to be common carriers and subject to control by law.

Sec. 11. The rolling stock and other movable property belonging to any public service corporation in this State, shall be considered personal property, and its real and personal property, and every part thereof, shall be liable to attachment, execution, and sale in the same manner as the property of individuals; and the law-making power shall enact no laws exempting any such property from attachment, execution, or sale.

Sec. 12. All charges made for service rendered, or to be rendered, by public service corporations within this State shall be just and reasonable, and no discrimination in charges, service, or facilities shall be made between persons or places for rendering a like and contemporaneous service, except that the granting of free or reduced rate transportation may be authorized by law, or by the Corporation Commission, to the classes of persons described in the Act of Congress approved February 11, 1887, entitled An Act to Regulate Commerce, and the amendments thereto, as those to whom free or reduced rate transportation may be granted.

Sec. 13. All public service corporations and corporations whose stock shall be offered for sale to the public shall make such reports to the Corporation Commission, under oath, and provide such information concerning their acts and operations as may be required by law, or by the Corporation Commission.

Sec. 14. The Corporation Commission shall, to aid it in the proper discharge of its duties, ascertain the fair value of the property within the State of every public service corporation doing business therein; and every public service corporation doing business within the State shall furnish to the Commission all evidence in its possession, and all assistance in its power, requested by the Commission in aid of the determination of the value of the property within the State of such public service corporation.

Sec. 15. No public service corporation in existence at the time of the admission of this State into the Union shall have the benefit of any future legislation except on condition of complete acceptance of all provisions of this Constitution applicable to public service corporations.

Sec. 16. If any public service corporation shall violate any of the rules, regulations, orders, or decisions of the Corporation Commission, such corporation shall forfeit and pay to the State not less than one hundred dollars nor more than five thousand dollars for each such violation, to be recovered before any court of competent jurisdiction.

Sec. 17. Nothing herein shall be construed as denying to public service corporations the right of appeal to the courts of the State from the rules, regulations, orders, or decrees fixed by the Corporation Commission, but the rules, regulations, orders, or decrees so fixed shall remain in force pending the decision of the courts.

Sec. 18. Until otherwise provided by law, each Commissioner shall receive a salary of three thousand dollars a year, together with his actual necessary expenses when away from home in the discharge of the duties of his office.

Sec. 19. The Corporation Commission shall have the power and authority to enforce its rules, regulations, and orders by the imposition of such fines as it may deem just, within the limitations prescribed in Section 16 of this Article.

APPENDIX O.

THE BLUE SKY LAW OF KANSAS.

REGULATION AND SUPERVISION OF INVESTMENT COMPANIES IN KANSAS.

CHAPTER 133, SESSION LAWS 1911 (H. B. 906), AS AMENDED BY SENATE BILL, 145
SESSION OF 1913.

AN ACT to provide for the regulation and supervision of investment companies and providing penalties for the violation thereof.

Be it enacted by the Legislature of the State of Kansas:

Sec. 1. The name 'Investment Company' as used in this act shall include: (1) Every person, corporation, company, co-partnership or association whether incorporated or unincorporated, except state and national banks, trust companies, real estate mortgage companies dealing exclusively in real estate mortgage notes, building and loan associations, and other associations and corporations not organized for profit, which shall offer or negotiate for the sale of, take subscription for, or sell any stocks, bonds, contracts, or other securities of any kind or character—other than bonds of the United States, state or municipal bonds, stock of state or national banks, building and loan associations, or corporations not organized for profit, and notes

secured by mortgages on real estate, located in the state of Kansas—to any person or persons in the state of Kansas. (2) Every person, corporation, company, co-partnership or association who shall issue, sell, offer or negotiate for the sale of any contract for deed, bond for deed, or other papers by whatever names such instruments may be designated, providing that when certain payments are made or certain conditions fulfilled, a deed or title will be delivered to certain parts or parcels of land, providing that such land is not located in the state of Kansas. (3) Every person, company, co-partnership, corporation, or association organized or which may hereafter be organized, doing business as a so-called investment company, loan, benefit, co-operative, home, or guarantee company, not specifically covered by the foregoing provisions, and for the licensing, control and supervision of which there is no law in force in this state.

Sec. 2. It shall be unlawful for any investment company or any representative thereof, to sell, take subscription for, offer or negotiate for the sale, in any manner whatsoever, of any stocks, bonds, contracts, or other securities of any kind or character, other than those exempted from the provisions hereof without a permit from the bank commissioner. Before securing such permit it shall be necessary for each and every investment company to file in the office of the bank commissioner, together with a filing fee of twenty-five dollars, the following papers, documents, statements and such other information as said bank commissioner shall deem necessary in each case to-wit: (1) An itemized statement of its actual financial condition, and the amount of its assets and liabilities. (2) A copy of all contracts, stocks and bonds, or other securities which it proposes to make, sell or negotiate to sell to its contributors. (3) Sample copies of all literature or advertising matter used or to be used by such investment company in the sale of its securities. (4) A copy of its constitution and by-laws or articles of co-partnership or association. (5) If it be an incorporated investment company it shall also file a copy of its charter, and if said company be not organized under the laws of the state of Kansas it shall be required to comply with the laws relating to the admission of foreign corporations to do business in the state of Kansas.

NOTE.—The above are sections 1 and 2 of Senate Bill No. 485 of the Session of 1913, and amends and repeals sections 1 and 2 of chapter 133 of the Session Laws of 1911.

Sec. 3. All the above-described papers shall be verified by the oath of a member of a co-partnership or company, if it be a co-partnership or company, or by the oath of a duly authorized officer, if it be an incorporated or unincorporated association. All such papers, however, as are recorded or are on file in any public office shall be further certified to by the officer of whose records or archives they form a part, as being correct copies of such records or archives.

Sec. 4. Every foreign investment company shall also file its written consent irrevocable, that actions may be commenced against it, in the proper court of any county in this state in which a cause of action may arise or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service of process on the secretary of state shall be taken and held, in all courts, to be as valid and binding as if due service had been made upon the company itself, according to the laws of this or any other state, and such instrument shall be authenticated by the seal of said foreign investment company and by the signature of a member of the co-partnership or company, if it be a co-partnership or company, or by the signatures of the president and secretary of the incorporated or unincorporated association, if it be an incorporated or unincorporated association, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers of the corporation authorizing the said secretary and president to execute the same.

Sec. 5. It shall be the duty of the bank commissioner to examine the statement and documents so filed and if said bank commissioner shall deem it advisable, he shall

make or have made a detailed examination, audit and investigation of such investment company's affairs and furnish a full and complete statement or report of his investigation to the charter board, providing that such investment company may at its option refuse in writing to have such investigation made, in which event the said bank commissioner shall at once reject its application. The charter board shall examine the statement or report and if said charter board shall find that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contracts contain and provide for a fair, just and equitable plan for the transaction of business, and in their judgment promises a fair return on the stocks, bonds, contracts or other securities by it offered for sale, the said charter board shall order the bank commissioner to issue to such investment company a statement entitling it to sell such securities in the state of Kansas. The bank commissioner shall thereupon issue to such investment company such statement reciting that such company has complied with the provisions of this act, that detailed information in regard to the company and its securities is on file in the bank commissioner's office, that such investment company is permitted to sell its securities in this state, and such statement shall also recite in bold type that the bank commissioner nor the charter board in no wise recommend the securities to be offered for sale by such investment company. Such permit, however, shall be subject to revocation at any time by the bank commissioner, with the consent of the charter board, for cause to him and it, sufficient. But if said charter board finds that such articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract contain any provision that is unfair, unjust, inequitable or oppressive to any class of contributors or if the charter board decides, from the information obtained by the investigation or examination made by the bank commissioner of the affairs of such investment company that said company is not solvent, or does not promise a fair return on the stock, bonds, contract or other securities by it offered for sale, then it shall direct the bank commissioner to not grant such company a permit as herein provided and the bank commissioner shall notify said company in writing of the decision of the said charter board; provided, however, that the bank commissioner may make special investigation and ascertain the reputation of every person, set of persons, association, company, co-partnership or corporation, who shall deal in stocks, bonds, contracts or other securities covered by this act, or who shall sell, offer or negotiate for the sale of any stocks, bonds, contracts, or other securities covered by this act in the state of Kansas, underwriting or purchasing such securities and reselling to any person or persons in the state of Kansas at a commission or profit, especially as to the class of stock, bonds, contract and other securities negotiated or sold by them. The said bank commissioner may, with the written consent of the charter board, excuse such person, set of persons, associations, company, co-partnership, or corporation from filing a copy of each security as provided in section 2 of this act, and may issue to such party or parties a special license entitling them to sell such stocks, bonds, contracts and other securities in the state of Kansas as are not objected to by the charter board, provided that such licensee shall file on the first day of each month a list of the stocks, bonds and other securities on hand for sale and sold or negotiated for sale by it during the preceding month, and provided further that the said bank commissioner with the consent of the charter board shall have authority to prohibit said licensee from selling or negotiating for sale any stocks, bonds, contracts or other securities at any time, or cancel said license at any time he decides that said licensee is not selling or dealing in such securities as he deems good legitimate investments.

NOTE.—The above is section 3 of Senate Bill No. 485 of the Session of 1913, and amends and repeals section 5 of chapter 133 of the Session Laws of 1911.

Sec. 6. It shall not be lawful for any investment company, either as principal or agent, to transact any business, in form or character similar to that set forth in section 1 of this act, except as is provided in section 2 of this act, until it shall have

filed the papers and documents above provided for. No amendment of the charter, articles of incorporation, constitution and by-laws of any such investment company shall become operative until a copy of the same has been filed with the bank commissioner as provided in regard to the original filing of charters, articles of incorporation, constitution and by-laws, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statement required to be filed by section 2 of this act, or to make any contracts other than that shown in the copy of the proposed contract required to be filed by section 2 of this act, until a written statement showing in full detail the proposed new plan of transacting business and a copy of the proposed new contract shall have been filed with the bank commissioner, in like manner as provided in regard to the original plan of business and proposed contract, and the consent of the bank commissioner obtained as to making such proposed new plan of transacting business and proposed new contract.

Sec. 7. Any investment company may appoint one or more agents, but no such agent shall do any business for said investment company in this state until he shall first register with the bank commissioner as agent for such investment company, and for each of such registrations there shall be paid to the bank commissioner the sum of one dollar. Such registration shall entitle such agent to represent said investment company as its agent until the 1st of March following, unless said authority is sooner revoked by the bank commissioner; and such authority shall be subject to revocation at any time by the bank commissioner for cause appearing to him sufficient.

Sec. 8. Every investment company, domestic or foreign, shall file at the close of business on December 31st and June 30th of each year, and at such other times as required by the bank commissioner, a statement verified by the oath of the co-partnership or company, if it be a co-partnership or company, or by the oath of a duly authorized officer, if it be an incorporated or an unincorporated association, setting forth in such form as may be prescribed by the said bank commissioner, its financial condition and the amount of its assets and liabilities, and furnish such other information concerning its affairs as said bank commissioner may require. Each regular statement of December 31st and June 30th shall be accompanied by a filing fee of two dollars and fifty cents. Any investment company failing to file its report at the close of business December 31st and June 30th of each year within ten days of that date, or failing to file any other or special report herein required within thirty days after receipt of request or requisition therefor, shall forfeit its right to do business in this state.

Sec. 9. The general accounts of every investment company, domestic or foreign, doing business in this state, shall be kept by double entry, and such company, its co-partners or managing officers, shall at least once in each month make a trial balance of such accounts, which shall be recorded in a book provided for that purpose; such trial balances and all other books and accounts of such company shall at all times during business hours, except on Sundays and legal holidays, be open to the inspection of stockholders and investors in said company or investors in the stocks, bonds, or other securities by it offered for sale and to the bank commissioner and his deputies.

Sec. 10. The bank commissioner shall have general supervision and control, as provided by this act, over any and all investment companies, domestic or foreign, doing business in this state, and all such investment companies shall be subject to examination by the bank commissioner or his duly authorized deputies at any time the bank commissioner may deem it advisable, and in the same manner as is now provided for the examination of state banks. The rights, powers and privileges of the bank commissioner in connection with such examinations shall be the same as is now provided with reference to examination of state banks; and such investment company shall pay a fee for each of such examination not to exceed fifteen dollars for each

day or fraction thereof plus the actual travelling and hotel expenses of said bank commissioner or deputy that he is absent from the capitol building for the purpose of making such examination, and the failure or refusal of any investment company to pay such fees upon the demand of the bank commissioner or deputy while making such examination shall work a forfeiture of its right to do business in this state; and provided further, that every investment company or stock broker licensed under this act shall file at the close of business December 31st, March 31st, June 30th and August 31st of each year, and such other times as required by the bank commissioner, a statement setting forth, in such form as may be prescribed by said bank commissioner, its financial condition, amount of its properties and liabilities, and such other information concerning its affairs as said bank commissioner may require. Each such statement shall be accompanied by a filing fee of two dollars and fifty cents. Any investment company or stockbroker failing to file its report as herein provided within ten days of the dates herein specified, or failing to file any special report within thirty days after receipt or request from the bank commissioner therefor, shall forfeit its right to do business in this state by reason thereof.

NOTE.—The above is section 4 of Senate Bill No. 485 of the Session of 1913, and amends and repeals section 10 of chapter 133 of the Session Laws of 1911.

Sec. 11. Whenever it shall appear to the bank commissioner that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable or unauthorized manner, or is jeopardizing the interest of its stockholders or investors in stocks, bonds or other securities by it offered for sale, or whenever any investment company shall fail or refuse to file any papers, statements or documents required by this act, without giving satisfactory reasons therefor, said bank commissioner shall at once communicate such facts to the attorney-general who shall thereupon apply to the supreme court or to the district court where such company is located or is doing business, or to a judge of either of said courts for the appointment of a receiver to take charge of and wind up the business of such investment company, and if such fact or facts be made to appear it shall be sufficient evidence to authorize the appointment of a receiver and the making of such orders and decrees in such cases as equity may require.

Sec. 12. Any person who shall knowingly or wilfully subscribe to or make or cause to be made any false statements or false entry in any book of such investment company, or exhibit any false paper with the intention of deceiving any person authorized to examine into the affairs of such investment company, or shall make or publish any false statement of the financial condition of such investment company, or the stocks, bonds or other securities by it offered for sale, shall be deemed guilty of a felony, and upon conviction thereof shall be fined not less than two hundred dollars nor more than ten thousand dollars, and shall be imprisoned for not less than one year nor more than ten years in the state penitentiary.

Sec. 13. Any person or persons, agent or agents who shall sell or attempt to sell the stock, bonds or other securities of any investment company, domestic or foreign, or the stock, bonds or other securities by it offered for sale, who have not complied with the provisions of this act, or any investment company, domestic or foreign, which shall do any business, or offer or attempt to do any business, except as provided in section two of this act, which shall not have complied with the provisions of this act, or any agent or agents who shall do or attempt to do any business for any investment company, domestic or foreign, in this state, which agent is not at the time duly registered and has fully complied with the provisions of this act, shall be deemed guilty of a felony and upon conviction thereof shall be fined for each offence not less than one hundred nor more than five thousand dollars or by imprisonment for not less than one year nor more than three years in the state penitentiary, or both such fine and imprisonment at the discretion of the court.

Sec. 14. All fees herein provided for shall be collected by the bank commissioner and by him shall be turned into the state treasury, and all fees so turned into the state treasury are hereby reappropriated to the bank commissioner for the purpose of paying all salaries and expenses necessary for carrying this act into effect; and the bank commissioner is hereby authorized to appoint such clerks and deputies as are actually and absolutely necessary to carry this act into full force and effect, none of whom shall be related by blood or marriage to such bank commissioner or any of his deputies. All money actually and necessarily paid out by the bank commissioner to any clerk or deputy appointed under this act, as salaries, or any money actually and necessarily paid out by the bank commissioner, or by any clerk or deputy appointed under this act, for travelling or incidental expenses shall be paid by the state treasurer out of such fees upon the state auditor's warrants, to be issued upon sworn vouchers containing an itemized account of such salaries or expenses.

Sec. 15. Should the courts declare any section of this act unconstitutional or unauthorized by law, or in conflict with any other section or provision of this act, then such decision shall affect only the section or provision so declared to be unconstitutional, and shall not affect any other section or part of this act.

Sec. 16. That original sections 1, 2, 5, 10 and 13 of chapter 133 of the Session Laws of 1911 and all acts or parts of acts in conflict herewith are hereby repealed.

Sec. 17. This act shall take effect and be in force from and after its publication in the official paper.

Form No. 47.

Sheet 1.

BEFORE THE KANSAS STATE BANKING DEPARTMENT.

In the matter of the application of

Name.

Address.

No.

for authority to sell its securities in Kansas under the provisions of chapter
133, Session Laws of 1911.

The Company
of..... represents to the Kansas State Bank Commissioner:

1st. That its principal business office is located at....., and that it has branch
offices at

2nd. That it was incorporated on the..... day of..... 19.., under the laws of the
state of....., with an authorized capital of \$ divided into.....
..... shares of common and..... shares of preferred, with a par value of \$..... each; and
that it has an authorized bond issue of \$.....

3rd. That the following is a full and correct statement of its capital stock and securities
on this date:

Authorized capital.....	{ Common Stock, \$.....
	{ Preferred Stock, \$.....
Issued and outstanding.....	{ Common Stock, \$.....
	{ Preferred Stock, \$.....
Bonds authorized.....	\$.....
Bonds issued.....	\$.....
Other securities called.....	Authorized, \$.....
Other securities called.....	Issued, \$.....

4th. That the following is a true and complete statement, showing the consideration
received from the stock issued and outstanding to date:

COMMON STOCK.

	No. Shares.	*Actual Value.	Remarks.
Actual cash			
Notes			
Real estate			
Plant.....			
Equipment.....			
Patents.....			
Organizing.....			
Promotion.....			
Commissions.....			
Salaries			
Dividends			
Totals.....			

* This column should specify the actual amount of cash or notes received, or the actual
value of real estate, &c., received in exchange for stock issued, and should correspond with
value at which these different items were given in to the company and carried on the books.

PREFERRED STOCK.

	No. Shares.	Actual Value.	Remarks.
Actual cash			
Notes			
Real estate			
Plant			
Equipment			
Patents			
Organizing			
Promotion			
Commissions			
Salaries			
Dividends			
Totals			

BONDS.

	No. Shares.	Actual Value.	Remarks.
Actual cash			
Notes			
Real estate			
Plant			
Equipment			
Patents			
Organizing			
Promotion			
Commissions			
Salaries			
Dividends			
Totals			

5th. Attached hereto, marked Exhibit A, is a statement giving a true and complete list of the holders of the securities of this company, indicating the consideration which was given for same.

6th. Attached hereto, marked Exhibit B, is a statement describing fully the real estate, plant, equipment, patents, &c., received in exchange for stock.

7th. That the following is a complete and correct statement of its assets and liabilities:

ASSETS.

	Amount.	Write nothing in this column.
Real estate		
Bills receivable		
Accounts receivable		
Cash on hand		
Cash in banks		
Other assets as follows		
Totals		

Form No. 47.

Sheet 3.

LIABILITIES.

	Amount.	Write nothing in this column.
Common stock outstanding.....		
Preferred stock outstanding.....		
Bonds outstanding.....		
Mortgages.....		
Bills payable.....		
Accounts payable.....		
Sinking fund or reserve.....		
Surplus.....		
Other liabilities as follows:		
Total.....		

8th. That attached hereto, marked Exhibit C, is a true and correct trial balance sheet of its books on the date of the above statement.

9th. That the following is a true statement of its profit and loss account for the.....
(6 or 12)
months prior to this date.

Loss.			Profit.		
Carried to surplus.....			Undivided profits.....19..		
Dividends, common stock...per cent.....			Gross earnings. (Specify sources).....		
Dividends, preferred stock...per cent.....					
Interest paid on bonds.....					
Interest borrowed money.....					
Operating expenses.....					
Commissions.....					
Salaries.....					
Gain.....			Loss.....		
Total.....			Total.....		

10th. That attached hereto, marked Exhibit D, is a true and complete statement of its receipts and disbursements for the past..... months, as shown by its books.
(6 or 12)

11th. That the following is the general plan upon which the company is doing and intends to do business, and the purposes for which said securities are to be sold:.....

.....

12th. That it has adopted the following plan for the sale of its stock:.....

13th. That attached hereto, marked Exhibit E, is a blank certificate of its stock or other securities it desires to sell, together with a true copy of its subscription blank, and all other blanks used in connection therewith.

14th. That attached hereto, marked Exhibit F, is a true and complete copy of its constitution and by-laws or articles of co-partnership.

15th. That attached hereto, marked Exhibit G, is a true and complete copy of its charter, further certified to as being a true copy by the recording officer of the state under which it is incorporated.

NOTE.—Questions Nos. 16 and 17 are for companies only which are incorporated under the laws of another state than Kansas.

16th. That attached hereto, marked Exhibit H, is the written, irrevocable consent for service of process, as provided in section 4 of chapter 133, Session Laws of 1911.

17th. That attached hereto, marked Exhibit I, is a certified copy of the resolution passed by its board of directors, authorizing the execution of the blank designated as Exhibit H.

1. An itemized statement of its actual financial condition, and the amount of its assets and liabilities.
2. A copy of all contracts, stocks and bonds, or other securities which it proposes to make, sell or negotiate to sell to its contributors.
3. Sample copies of all literature or advertising matter used or to be used by such investment company in the sale of its securities.
4. A copy of its constitution and by-laws or articles of co-partnership or association.
5. If it be an incorporated investment company it shall also file a copy of its charter, and if said company be not organized under the laws of the state of Kansas it shall be required to comply with the laws relating to the admission of foreign corporations to do business in the state of Kansas.
- 18th. That the following is a true statement in regard to its officers and directors:

Name.	Address.	Number Shares and Bonds owned.			Actual Cash invested in Company.	Salary per Year.	Estimate net worth.	Time devoted to Company.
		Com-mon.	Pre-ferred	Bonds				
President								
Vice President								
Secretary								
Treasurer								
General Manager								
Trustees and Directors.....								
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								

- 19th. That its securities will be sold for the following-named prices and on the following terms, and will not be sold at any other price or on any other terms without the consent of the Banking Department:.....
- 20th. That attached hereto, marked Exhibit J, is a true and complete copy of each contract made, or which will be made, with any person, officer, agent or other representative of this company for the sale of its stock; and that there are no agreements, understandings or contracts, either verbal, written or implied, by which any one has received, or is to receive, any cash, stock, securities or other compensation for the sale of its securities, for its promotion, or for any other causes except as specified in this application and its several exhibits attached, and that all of the stock securities of this company will be sold or disposed of for cash or its equivalent, as provided in the contracts or agreements attached, except as herein excepted.
- Remarks
- NOTE.—Please give at least four references as to the character, responsibility and financial standing of each director. Also eight references as to the company itself.
- Wherefore, your petitioner, in view of the showing herein made, does respectfully pray that authority be granted it to sell its securities as follows: \$.....Common Stock, \$.....Preferred Stock, \$.....Bonds, and \$.....other securities, in accordance with the provisions of the above-mentioned law.
- IN TESTIMONY WHEREOF, We have hereunto set our hands and affixed the official seal of this company, this the.....day of.....19.....

[SEAL]

.....(Company.)

By.....(President.)

Attest.....Secretary.

State of....., County of....., ss

.....President, and.....Secretary

of the.....Company, of.....

of lawful age, being first duly sworn, depose and say that they have each read the foregoing application and know the contents thereof, and that the statements and allegations therein contained and attached are true.

.....(President.)

.....(Secretary.)

Subscribed and sworn to before me this the.....day of.....19..

.....(Notary Public.)

(My commission expires.....)

BEFORE THE KANSAS STATE BANKING DEPARTMENT.

IN THE MATTER OF THE CONDITION OF

(Name)

(Address)

No.

At the close of business

The
of
represents to the Kansas State Bank Commissioner as follows:

1st. That the following is a full and correct statement of its capital stock or other securities on the above date,

Authorized capital	{ Common stock.....\$.\$.
	{ Preferred stock.....\$.\$.
Capital stock issued	{ Common stock.....\$.\$.
	{ Preferred stock.....\$.\$.
Bonds authorized\$.\$.
Bonds issued\$.\$.
Other securities authorized\$.\$.
Other securities issued\$.\$.

2nd. That the following is a complete and correct statement of its assets and liabilities on the above date:

ASSETS.

	Amount.	Write nothing in this column.
Total		

LIABILITIES.

	Amount.	Write nothing in this column.
Common stock outstanding		
Preferred stock outstanding		
Total		

3rd. That attached hereto, marked "Exhibit A," is a true and correct trial balance of its books on the above date.

4th. That the following is a true statement of its profit and loss account for the three months prior to this date:

Loss.		Profit.	
Carried to surplus.....		Undivided profits.....191.....	
Dividends, common stock...per cent.....		Gross earnings (specify sources).....	
Dividends, preferred stock...per cent.....			
Interest paid on bonds.....			
Interest borrowed money.....			
Operating expenses.....			
Commissions.....			
Salaries.....			
Gain.....		Loss.....	
Total.....		Total.....	

5th. That attached hereto, marked "Exhibit B," is a true and complete statement of its receipts and disbursements since its last statement to the banking department.

6th. That attached hereto, marked "Exhibit C," is a full and complete list of the holders of its stocks, bonds or other securities authorized by said banking department to be sold, which have become such holders since its last statement to said banking department, indicating the consideration which was received by said company from each of such holders, also a list of the transfers of stock made by it since last statement.

7th. That since its last statement to said banking department it has:

Paid cash commissions for the sale of stock.....	\$.....
Issued stock for commissions.....	\$.....
Paid cash for promotion	\$.....
Issued stock for promotion.	\$.....
.....	\$.....

A total of.....\$.....

which is all the commissions or promotion expense paid by said company since its last statement to said banking department.

8th. That it is complying fully with chapter 133 of the Session Laws of 1911 in every respect, including the keeping of double-entry books and filing monthly trial balance sheets.

9th. That its officers on this date are as follows:

President.....	
Vice President....	
Secretary.....	
Treasurer.....	
Manager.....	

Form No. 48.

Sheet No. 3.

10th. That its directors on this date are as follows:

.....

IN TESTIMONY WHEREOF, We have hereunto set our hands and affixed the official seal
 of this company, this the.....day of.....191....

.....
 (Company)

[SEAL]

By
 (President)

Attest :.....
 (Secretary)

STATE OF, }
 COUNTY OF, } ss.

....., President, and.....Secretary,
 of the.....
 of.....
 of lawful age, being first duly sworn, depose and say that they have each read the foregoing
 statement, and that the statements therein contained and attached are true.

.....
President.

.....
Secretary.

SUBSCRIBED AND SWORN TO before me, this the.....day
 of.....191....

.....
Notary Public.

(My commission expires.....)

NOTE.—Filing fee of \$2.50 must accompany this statement.

BEFORE THE KANSAS STATE BANKING DEPARTMENT
IN THE MATTER OF THE APPLICATION OF

Name.

Address.

No.

for authority to sell its land in Kansas under the provisions of chapter 133,
Session Laws of 1911, as amended.

The.....Company
of.....represents to the Kansas State Bank Commissioner;
1st. That its principal business office is located at....., and
that it has branch offices at.....
2nd. That it was incorporated on the.....day of.....19...., under
the laws of the state of....., with an authorized capital of \$.....,
divided into.....shares of common and.....shares of preferred,
with a par value of \$.....each; and that it has an authorized bond issue of \$.....
3rd. That the following is a full and correct statement of its capital stock and securities
on this date;

Authorized capital	Common stock, \$.....
	Preferred stock, \$.....
Issued and outstanding.....	Common stock, \$.....
	Preferred stock, \$.....
Bonds authorized.....	\$.....
Bonds issued	\$.....
Other securities called, Authorized.....	\$.....
Other securities called, Issued	\$.....

4th. That the following is a true and complete statement, showing the consideration
received from the stock issued and outstanding to date:

COMMON STOCK.

	No. Shares.	*Actual Value.	Remarks.
Actual cash.			
Notes.....			
Real estate			
Plant.....			
Equipment.....			
Patents.....			
Organizing.....			
Promotion.....			
Commissions.....			
Salaries			
Dividends			
Totals.....			

* This column should specify the actual amount of cash or notes received, or the actual
value of real estate, &c., received in exchange for stock issued, and should correspond with
value at which these different items were given in to the company and carried on the books.

FORM No.

SHEET 2.

LOCATION OF LAND OFFERED FOR SALE.

It is located in the State of....., County of.....

Total number of acres.....described as follows, to wit:.....

.....

.....

.....

.....

.....

.....

Acres upland.....; acres bottom land.....; acres cultivated.....;

acres capable of cultivation.....; acres grass.....; acres timber.....

The land is watered by.....and.....subject to overflow. The general

character and quality of the soil is.....

.....

What is now growing on the land?.....

What are the principal products?.....

.....

Value per acre of average crop is.....

How long has part or all of this land been under cultivation?.....

.....

.....

In whom is the title now vested?.....

.....

When did the owner purchase said land?.....

.....

At what price?.....; Cash.....; Trade.....

What is the present cash value per acre without improvements?.....

.....

What is the assessed value without improvements?.....

.....

What is the selling price per acre of improved land in the vicinity?.....

.....

Are there any existing liens against said land?.....

.....

How long have you had actual and peaceable possession of said land?.....

.....

What is the nearest railroad station?.....

.....

DESCRIPTION OF LAND.

General surface
.....
What is the soil—sandy loam, clay loam or clay?.....
How deep is the soil?
How deep is the subsoil?
How is the land watered?.....
Is any portion stony, gravelly, alkaline, wet, heavy, or in any other way unfit for cultivation? (State fully which and number of acres of each).,.....
.....
Does the cultivated land lie all in one body?.....
If not, in how many pieces and how located? (Show on plat.)

PLAT.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

What improvements have you made since buying the land?
What was produced on said land in 1910?.....
1911? 1912?.....
Is the land now mortgaged?.....
What is the selling price per acre?.....

Attached hereto are the following papers, documents and statements:

- 1st. An itemized statement of its actual financial condition, and the amount of its assets and liabilities.
- 2nd. A copy of all contracts or other securities which it proposes to make, sell or negotiate to sell to its contributors. Also abstract of title, and legal opinion on same.
- 3rd. Sample copies of all literature or advertising matter used or to be used by such investment company in the sale of its securities.
- 4th. A copy of its constitution and by-laws or articles of co-partnership or association.
- 5th. If it be an incorporated investment company it shall also file a copy of its charter; and if said company be not organized under the laws of the state of Kansas it shall be required to comply with the laws relating to the admission of foreign corporations to do business in the state of Kansas.

FORM NO.

SHEET 4.

REFERENCES:

(NOTE.—Please give at least four references as to the character, responsibility and financial standing of each director. Also eight references as to the company itself.)

.....
.....
.....
.....
.....
.....
.....
.....
.....

In what size tracts do you sell the land?.....

.....
.....
.....
.....
.....
.....
.....
.....
.....

Have you platted your entire tract?.....

.....
.....
.....

Are you selling the inferior tracts at the same price you charge for the balance? (Explain fully what you did with the waste and inferior land.)

.....
.....
.....
.....

What is your selling price per acre and on what terms? (State fully.).....

.....
.....
.....
.....

Will you, when requested by the State Bank Commissioner, pay the necessary expenses of examination of said land?.....

18th. That the following is a true statement in regard to its officers and directors:

Name.	Address.	Actual Cash Invested in Company.	Salary per Year.	Estimate Net Worth.	Time devoted to Company.
President					
Vice President					
Secretary					
Treasurer					
General Manager					
Trustees and Directors					
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					

19th. That its land will be sold for the following-named prices and on the following terms, and will not be sold at any other price or on any other terms without the consent of the Banking Department:.....

20th. That attached hereto is a true and complete copy of each contract made, or which will be made, with any person, officer, agent or other representative of this company for the sale of its land; and that there are no agreements, understanding or contracts, either verbal, written or implied, by which anyone has received, or is to receive, any cash, land, securities or other compensation for the sale of its land, for its promotion, or for any other causes except as specified in this application and its several exhibits attached, and that all of the land of this company will be sold or disposed of for cash or its equivalent, as provided in the contracts or agreements attached, except as herein excepted.

Remarks

Wherefore, your petitioner, in view of the showing herein made, does respectfully pray that authority be granted it to sell its land in accordance with the provisions of the above-mentioned law.

IN TESTIMONY WHEREOF, We have hereunto set our hands and affixed the official seal of this company, this the.....day of.....191.....

[SEAL]
(Company.)

By.....
President.

Attest:.....
Secretary.

STATE OF....., COUNTY OF....., SS.

.....President, and.....Secretary
of the.....Company, of.....
of lawful age, being first duly sworn, depose and say that they have each read the foregoing application and know the contents thereof, and that the statements and allegations therein contained and attached are true.

.....
President.
.....
Secretary.

Subscribed and sworn to before me this the.....day of.....191....

(My commission expires)
Notary Public.

STATE OF KANSAS BANKING DEPARTMENT.

CHAS. M. SAWYER, *Bank Commissioner.*

C. J. PETERSON, *Special Assistant.*

This Statement is to Certify, That

The
with head offices at
has complied with the provisions of Chapter 133, Session Laws of 1911, and its amendments,
and that detailed information regarding it and the.....
offered by it for sale is on file in this office for public inspection and information, and said
.....is permitted to do business in this State.

The Bank Commissioner nor the Charter Board in no wise recommend the above-named securities.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name. Done at Topeka, Kan., the
.....day of.....191....

.....
Bank Commissioner.

.....
Special Assistant.

STATE OF KANSAS BANKING DEPARTMENT.

CHAS. M. SAWYER, *Bank Commissioner.*

C. J. PETERSON, *Special Assistant.*

This Statement is to Certify, That.....
has been duly registered with this Department, according to the provisions of Chapter 133,
Session Laws of 1911, and its amendments, as agent of The.....
which.....is permitted to do business in this State under the provisions
of the above-named law, and such registration entitles said agent to represent said
as its agent until March 1, 191....., unless said authority is sooner revoked by this Depart-
ment

The Bank Commissioner nor the Charter Board in no wise recommend the securities of
the above-named.....offered by such agent for sale.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name. Done at Topeka, Kan., the
.....day of.....191....

.....
Bank Commissioner.

By
Special Assistant.

APPENDIX P.

STATUTE OF STATE OF LOUISIANA, 1912.

ACT No. 40.

HOUSE BILL NO. 28.

By Mr. Samuel.

An Act levying a license tax on itinerant or travelling agents selling stock and bonds; regulating the sale of such stock and bonds by itinerant or travelling agents or vendors and requiring them to secure a certificate of permission before receiving a license; providing the cost and manner of securing such certificate of permission and license; and providing that bond and security be given that such stock or bonds are as represented; and providing a penalty for the violation of this act.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That every itinerant or travelling agent engaged in the sale of stocks or bonds of any corporation, whether organized in this State or any State or Territory, shall before being permitted to make any such sales, procure from the Secretary of State, at a cost of one dollar a written certificate of permission, which shall entitle him to procure from the sheriff of the parish, in which he proposes to engage in such sale, a license to do so, which license is hereby fixed at the sum of five dollars per annum, and any such agent who engages in such sales, before securing such certificate of permission and before payment of such license in each parish in which he operates, shall be deemed guilty of a misdemeanor and punished as hereinafter provided.

Certificate to
be procured
from the
Secretary
of State.

Sheriff to
issue license.

Section 2. Be it further enacted, etc., That each and every itinerant or travelling agent so engaged in the sale of such stock or bonds before securing such certificate of permission as aforesaid, shall file with the Secretary of State a sworn statement giving his name, residence and the name and kind of bonds or stock which he proposes to sell, with the par value thereof, as well as a full statement of the domicile and offices of the corporation whose bonds or stock he proposes to sell, and shall therein declare the market value of such bonds or stock with a brief statement of the property owned by such corporation with its location and any such itinerant or travelling agent who shall make any false statement in said affidavit shall be deemed guilty of perjury and prosecuted as such.

Sworn state-
ment to be
filed with the
Secretary
of State.

Section 3. Be it further enacted, etc., That each of such itinerant or travelling agents shall before securing such certificate of permission, or procuring of any license or making any sales of stock and bonds as hereinbefore referred to give bond in any sum not less than fifteen thousand dollars filed by the Secretary of State, and payable to him which bond shall be furnished by a surety company

Bond of \$15,000
to be filed.

and approved by the Secretary of State and the same shall be conditioned that he will make no false statement, or misrepresentation of facts in making such sales of said stock or bonds, the same to continue in full force for a period of two years from date, and any purchaser of stock or bonds from such agent shall have a right of action on this bond to recover any damages caused by any false statement or misrepresentation made by such agent in the sale of such stock or bonds to be recovered before any court of competent jurisdiction in the parish where the sale is made.

Same to be approved by the Secretary of State.

Section 4. Be it further enacted, etc., That any such itinerant or travelling agent engaged in the sale of such stock or bonds who shall make any false statement, false representations, or false promise in order to induce any person to buy such bonds or stock and a purchase is made relying thereon, shall be deemed guilty of misdemeanor and on conviction shall be punished as hereinafter provided.

Misdemeanor to make false representations.

Section 5. Be it further enacted, etc., That each certificate of permission and license shall designate the name of the company whose bonds or stocks are being sold under it, as well as the name of the person to whom it is issued and for each separate company or stocks and bonds represented, a separate bond shall be filed and separate certificate of permission and license obtained, and any agent who shall use or attempt to use any certificate of permission or license for the sale of stock and bonds not designated therein and not issued to him shall be deemed guilty of a misdemeanor and shall be punished as hereinafter provided.

Section 6. Be it further enacted, etc., That any itinerant or travelling agent as aforesaid, violating the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not more than \$500 or imprisoned not more than six months or both at the discretion of the court.

APPENDIX Q.

STATUTE OF STATE OF WISCONSIN, 1913.

[No. 560, S.]

CHAPTER 756, LAWS OF 1913.

An Act to create sections 1753—48 to 1753—53, inclusive, of the statutes relating to dealers in stocks and bonds and to the sale of stocks and bonds in the organization and promotion of certain corporations.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. There are added to the statutes six new sections to read: Section 1753—48. As used in sections 1753—48 to 1753—53, inclusive, the following words shall be understood in the sense herein set forth and defined:

(a) 'Company' means and includes all corporations, associations, or joint stock companies, whether organized or located within or without this state, issuing or authorized to issue any stocks, bonds, or other evidence of title to or interest in or lien upon any or all of its property.

(b) 'Security' or 'securities' means and includes any bonds, stocks, notes or other obligations or evidence of indebtedness which constitutes evidence of, or is secured by, title to, interest in or loan upon any or all of the property of such company.

(c) 'Dealer' means and includes all corporations, associations, joint stock companies or individuals organized or located within or without this state engaged in the business of buying or selling, offering for sale, or negotiating for the sale of any security to any corporation, association or individual in this state, but shall not include corporations, associations or individuals buying securities for the purpose of investment, or selling, offering for sale, or negotiating for the sale of securities bought or held by the seller for investment.

SECTION 1753—49. The provisions of sections 1753—48 to 1753—53, inclusive, shall not apply to:

(a) Securities of the United States or any foreign government, or of any state or territory thereof, or of any county, city, township, village, district, or other political or taxing subdivision of any state or territory of the United States or any foreign government.

(b) Commercial paper or evidence of indebtedness maturing not more than three years from the date thereof.

(c) Securities of public or quasi-public corporations, the issue of whose securities is regulated by the railroad commission of Wisconsin, or by a public service commission or board of equal authority of any state or territory of the United States, or securities senior thereto.

(d) Securities listed upon the New York, Boston or Chicago stock exchange, or upon any other stock exchange approved therefor by the railroad commission while such approval is unrevoked, or securities senior thereto, provided such securities or senior securities have not been disapproved by order of such commission.

(e) Securities of state or national banks or trust companies or building and loan associations of this state.

(f) The securities of any domestic corporation organized without capital stock or exclusively for educational, benevolent, charitable, or reformatory purposes, the articles of which provide that no dividend or pecuniary profit shall be declared or added to the members thereof.

(g) Mortgages upon real and personal property where the entire mortgage is sold and transferred with the notes secured by such mortgage.

(h) Securities of any domestic corporation whose authorized capital stock added to its other outstanding securities shall not exceed twenty-five thousand dollars.

(i) Securities sold to banks, trust companies, or other dealers.

SECTION 1753—50. 1. No dealer shall sell, offer for sale, or negotiate for the sale of, any securities not herein expressly exempted until such dealer shall have been licensed as provided herein and shall have filed with the railroad commission:

(a) A statement under oath upon blanks furnished by such commission showing the name and principal place of business of such dealer, and the names, residences and business addresses of all persons interested as officers, directors, trustees, members, or partners, with such other information as said commission may require.

(b) If such dealer is a non-resident of the state and is a corporation, it shall also have filed with the proper officer of this state its appointment of an attorney for service of process as required by law, and if not a corporation, such dealer shall file with the railroad commission an irrevocable appointment of the secretary of the rail-

road commission as attorney for service of process in all actions and proceedings which may be brought against such dealer arising out of transactions with residents of this state or had in this state.

2 Any such dealer shall from time to time furnish to the railroad commission such information relating to the securities sold or offered for sale as said commission may require; and the method of transacting such business shall be subject to such examinations as may be ordered by said commission.

3. Upon compliance with the provisions of law and the payment of a fee of one dollar, such dealer shall be entitled to a certificate or license, which shall expire on the thirty-first day of January next after the granting thereof, and which may be renewed annually upon the original application and such other information as said commission may require.

4. No such license shall be issued to any dealer or proposed dealer whose business is so conducted as to deceive or mislead investors or the public, nor unless its business is conducted in all respects in good faith and in compliance with law; and whenever the contrary shall appear to said commission the license theretofore issued shall be revoked.

SECTION 1753—51. 1. (a) The railroad commission shall have the supervision and charge of all matters mentioned in this section except where such supervision is expressly vested by law in any other or different agency of this state.

(b) Except as otherwise provided by law, every corporation, association, co-partnership or individual, herein termed company, organized, proposed to be organized, or which shall hereafter be organized, within or without this state, whether incorporated or unincorporated, which shall in this state, directly or indirectly, sell or negotiate for the sale of any stocks, bonds, or other evidences of indebtedness, or property or of interest in itself, all of which are in this section termed securities, upon which sale or proposed sale the whole or any part of the proceeds are used, or to be used directly or indirectly, for the payment of any commissions or other expenses in excess of twenty-five hundred dollars, incidental to the organization or promotion of any such company, shall be subject to this section.

2. Before offering or attempting to sell any such securities to any person or persons, or doing or offering to do any such business in this state, excepting that of preparing the documents hereinafter required, every such company, domestic or foreign, shall file with the railroad commission the following documents, to wit: A statement showing in full detail the plan upon which it proposes to transact business. A copy of all applications for and forms of contracts, bonds or other instruments which it proposed to make with or sell to its subscribers. A statement which shall show the name, location, and head office of the company and such other information as said commission may require. If it shall be a company organized under the laws of any other state, territory, or government, incorporated or unincorporated, it shall also file, (a) a statement specifying particularly the laws of such state, territory or government under which it exists or is incorporated, (b) a certificate of the proper officer of its home state that it is authorized to do business therein, and, (c) a copy of its articles of incorporation, constitution and by-laws and of all amendments thereto, and, (d) it shall also file or have filed the power of attorney mentioned in paragraph (b) of subsection 1 of section 1753—50 as therein required.

3. No advertisement, pamphlet, circular or other document shall be issued, circulated or delivered by such company, or its agent, within this state unless the same shall bear a serial number and a copy thereof shall first have been filed with such railroad commission, nor after such company has been notified of objection thereto by said railroad commission.

4. (a) No person for the purpose of organizing or promoting any company, or promoting the sale of securities or such company by it after organization, as principal or agent, shall sell or agree or attempt to sell within this state any securities in such

company unless the contract of subscription or of sale shall be in writing and contain a provision in the following language:

(b) 'No sum shall be used for commission, promotion and organization expenses on account for any share of stock or any bond or other security in this company in excess of——per cent of the amount actually paid up on separate subscriptions for such securities, and the remainder of such payments shall be held or invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be), and the directors and officers of such company after organization as bailees for the subscriber, to be used only in the conduct of the business for which such company is organized.'

(c) Funds and securities held by such organizers, trustees, directors or officers as bailees shall be deposited with any bank or trust company of this state until such company shall begin to conduct the business for which it is organized.

5. No person shall participate in, receive, or accept any part or promise of any part of the commissions or rewards of any organizer, promoter, or agent for the sale of any such securities, unless the name of such person and the fact of his interest in such commissions or rewards shall appear upon such contract of subscription. The omission of such statement from any such contract shall, in addition to the penalty herein provided, make such person liable to the purchaser or his assigns for all sums paid by such purchasers with interest at the legal rate from date of payment, upon the assignment or tender of assignment of the securities so purchased.

6. The said commission shall have the power to make such examinations of any such company at its expense, including actual expenses and the per diem of examiners, and to require such further information and reports as it may deem advisable, and whenever said commission shall find that the provisions of law have not been complied with or that the said company is not safe and solvent, or that its business is not lawful or is not conducted in a lawful manner, the said commission may order that the said company cease to transact business in this state, and after the making of such order no such company or representative thereof shall transact or offer to transact business within this state. Notice of such order shall be given and the same shall be subject to review and appeal as provided for other orders made by said commission.

7. No such company shall transact or offer to transact any such business within this state during any time after the taking effect of any change in its articles of organization, by-laws, or plan of doing business, or the making of any change in the form of its applications, or other contracts, before the same shall have been filed with said commission.

SECTION 1753—52. 1. Any corporation which shall violate or cause to be violated any of the provisions of sections 1753—48 to 1753—53, inclusive, in any matter relating to the issue or sale of its securities, or shall violate any order relating thereto lawfully made by said railroad commission, shall forfeit and pay into the state treasury a sum not more than five thousand dollars.

2. Any company, dealer, or person who shall directly, or indirectly, by himself or any agent, issue, sell, or offer to issue or sell, or be instrumental in issuing or selling or offering to issue or sell, any securities contrary to the provisions of sections 1753—48 to 1753—53, inclusive, or shall violate any order relating thereto lawfully made by said railroad commission, shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

3. Any person who shall wilfully make any false representation, either orally or in writing, to the railroad commission in any report or other information or communication required by, or in the source of any investigation provided for, or relative to any matter arising under the provisions of sections 1753—48 to 1753—53, inclusive, of the statutes, shall be deemed guilty of the offense provided for in section 4423 of the statutes and shall be punished as provided in such section for offenses where the

amount of money or the value of property involved exceeds the sum of one hundred dollars.

4. Any dealer, or any agent for a dealer, who shall sell, offer for sale, or invite offers for, or inquiries concerning, any securities, including those mentioned in section 1753—49 hereof, with intent to defraud, or who shall make any false representation relative thereto, shall upon conviction thereof, forfeit not more than one thousand dollars.

SECTION 1753—53. 1. In so far as applicable and not inconsistent with other provisions of law, the provisions, procedure, powers, duties, and liabilities prescribed by sections 1797m—1 to 1797m—109, inclusive, are extended to all matters contained in sections 1753—48 to 1753—53, inclusive.

2. Upon request of the commission the attorney general or the district attorney of the proper county shall aid in any investigation provided for, and in all trials and proceedings had under the provisions of sections 1753—48 to 1753—53, inclusive, and shall institute and prosecute any action or proceeding for the enforcement thereof.

SECTION 2. This act shall take effect October 1, 1913.

APPENDIX R.

EXTRACTS FROM THE STATUTE RESPECTING CORPORATIONS OF THE STATE OF ILLINOIS.

GENERAL CORPORATION LAW.

AN ACT CONCERNING CORPORATIONS.

Approved April 18, 1872; in force July 1, 1872; and amendments thereto in force July 1, 1911.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That corporations may be formed in the manner provided by this Act, for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money: *Provided*, that horse and dummy railroads, and organizations for the purchase and sale of real estate, for burial purposes only, may be organized and conducted under the provisions of this Act: *And, provided, further*, that corporations formed for the purpose of constructing railroad bridges shall not be held to be railroad corporations. [As amended by Act approved April 19, 1879, in force July 1, 1879.]

§ 2. Whenever any number of persons not less than three, nor more than seven, shall propose to form a corporation under this Act, they shall make a statement to that effect under their hands and duly acknowledged before some officer in the manner provided for the acknowledgment of deeds, setting forth the name of the proposed corporation, the object for which it is to be formed, its capital stock, the number of shares of which such stock shall consist, the location of the principal office and the duration of the corporation, not to exceed ninety-nine years, which statement shall be filed in the office of the Secretary of State. If the object for which said corporation is proposed to be organized is clearly and definitely stated, and is a lawful object, the Secretary of State shall thereupon issue to such persons a license as commissioners

to open books for subscription to the capital stock of said corporation at such times and places as they may determine; but no license shall be issued to two companies having the same or a similar name, nor shall any foreign corporation having the same or a similar name as any domestic corporation be admitted to this State under any foreign corporation law and no domestic corporation shall hereafter be organized with the same or a similar name as any foreign corporation previously admitted to do business in this State. Upon the filing of any statement with the Secretary of State for the purpose of obtaining a license to incorporate, he may propound such interrogatories as he shall deem necessary to ascertain the true object: *Provided*, that the Attorney General may file a bill in chancery in the name of the People of the State of Illinois, against any corporation authorized to confer degrees, diplomas or other certificate or certificates of qualification in the science of medicine, pharmacy or dentistry which conducts a fraudulent business or abuses, misuses or violates the terms of its charter, in any court having jurisdiction of the corporation and subject-matter of such bill, for an injunction to restrain said corporation from conducting its business fraudulently or abusing, misusing or violating the terms of its charter and also for the dissolution of said corporation, and thereupon it shall be the duty of the court in which said bill is filed to grant such injunction and to hear and determine the same as in other cases in chancery: *And provided, further*, that this Act shall apply to schools, colleges or universities which now are, or may hereafter be, licensed in this State, notwithstanding any provisions that may exist in their charters. [As amended by Act approved May 16, 1905; in force July 1, 1905.]

§ 3. As soon as may be, after the capital stock shall be fully subscribed, the commissioners shall convene a meeting of the subscribers, for the purpose of electing directors or managers, and the transaction of such other business as shall come before them. Notice thereof shall be given by depositing in the postoffice, properly addressed to each subscriber, at least ten days before the time fixed, a written or printed notice, stating the object, time and place of such meeting. In all elections for directors or managers of corporations organized under this Act, every subscriber or stockholder shall have the right to vote in person, or by proxy, for the number of shares owned or subscribed by him, for as many persons as there are directors or managers to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors or managers multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner. It shall be lawful for any such corporation, by resolution of the stockholders, to divide its board of directors or managers into three classes, numbered consecutively, the term of office of the first class to expire on the day of the annual election of said company then next ensuing; the second class one year thereafter, and the third class two years thereafter. At each annual election, after such classification, the stockholders of such company shall elect, for a term of three years, a number of directors or managers equal to the number in the class whose term expires on the day of such election. All other vacancies to be filled in accordance with the by-laws of the corporation.

§ 4. The commissioners shall make a full report of their proceedings, including therein a copy of the notice provided for in the foregoing section, a copy of the subscription list, a statement of the amount of the capital, not less than one-half actually paid in, the amount of such capital not paid in, what disposition has been made of stock subscribed and not paid, and if any proportion of the capital has been paid in property, the same shall be appraised by said commissioners and they shall report the fair cash value thereof; the names of the directors or managers elected and their respective terms of office, which report shall be sworn to by at least a majority of the commissioners and shall be filed in the office of the Secretary of State. The Secretary of State shall thereupon issue a certificate of the complete organization of the corpor-

ation, making a part thereof a copy of all the papers filed in his office in and about the organization of the corporation, and duly authenticated under his hand and seal of State, and the same shall be recorded in a book for that purpose, in the office of the recorder of deeds of the county where the principal office of such company is located. Upon the recording of the said copy, the corporation shall be deemed fully organized and may proceed to business. Unless such company shall be organized and shall proceed to business as provided in this Act within two years after the date of such license, then such license shall be deemed revoked, and all proceedings thereunder void. [As amended by Act approved May 16, 1905; in force July 1, 1905.]

§5. Corporations formed under this Act shall be bodies corporate and politic for the period for which they are organized; may sue and be sued; may have a common seal which they may alter or renew at pleasure; may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation. They may borrow money at legal rates of interest, and pledge their property, both real and personal, to secure the payment thereof; and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed: *Provided, however*, that all real estate, so acquired in satisfaction of any liability or indebtedness, unless the same may be necessary and suitable for the business of such corporation, shall be offered at public auction at least once every year, at the door of the court house of the county wherein the same be situated, or on the premises to be sold, after giving notice thereof for at least four consecutive weeks in some newspaper of general circulation published in said county; and if there be no such newspaper published therein, then in the nearest adjacent county where such newspaper is published; and said real estate shall be sold whenever the price offered for it is not less than the claim of such corporation, including all interest, costs, and other expense: *And, provided, further*, that in case such corporation shall not, within such period of five years, sell such land, either at public or private sale as aforesaid, it shall be the duty of the State's attorney to proceed by information, in the name of the People of the State of Illinois, against such corporation, in the circuit court of the county within which such land, so neglected to be sold, shall be situated, and such court shall have jurisdiction to hear and determine the fact, and to order the sale of such land or real estate at such time and place subject to such rules as the court shall establish. The court shall tax as the fees of the State's attorney such sum as shall be reasonable; and the proceeds of such sale, after deducting the said fees and costs of proceeding, shall be paid over to such corporation. The provisions of this section shall apply to and be binding upon all corporations now existing by virtue of any special charter granted by this State. [As amended by Act approved June 5, 1889; in force July 1, 1889.]

§ 6. The corporate powers shall be exercised by a board of directors or managers: *Provided*, the number of directors or managers shall not be increased or diminished, or their term of office changed, without the consent of the owners of a majority of the shares of stock. The officers of the company shall consist of a president, secretary and treasurer, and such other officers and agents as shall be determined by the directors or managers, and the directors or managers may adopt by-laws for the government of the officers and affairs of the company: *Provided*, they are not inconsistent with the laws of this State. The directors or managers may require of the officers and agents bonds, with such sureties and conditions as they shall deem proper and may remove any officers when the interest of the corporation shall require. The officers shall hold their respective offices for the period provided by the by-laws.

§ 7. The shares of stock shall be not less than ten nor more than one hundred dollars each, and shall be deemed personal property, and transferable as such in the manner provided by the by-laws, and subscriptions therefor shall be made payable

to the corporation, and shall be payable in such instalments and at such time or times as shall be determined by the directors or managers, and an action may be maintained in the name of the corporation to recover any instalment which shall remain due and unpaid for the period of twenty days after personal demand therefor, or, in cases where personal demand is not made, within thirty days after a written or printed demand has been deposited in the postoffice properly addressed to the postoffice address of the stockholder. The directors may, by by-laws, prescribe other penalties for a failure to pay the instalments that may from time to time become due, but no penalty working a forfeiture of stock, or of the amounts paid thereon, shall be declared as against any estate before distribution shall have been made or against any stockholder before demand shall have been made for the amount due thereon, either in person or by a written or printed notice duly mailed to the proper address of such stockholder at least thirty days prior to the time when such forfeiture is to take effect: *Provided*, that proceeds of said sale over and above the amount due on said shares shall be paid to the delinquent stockholder.

§ 8. Every assignment or transfer of stocks on which there remains any portion unpaid shall be recorded in the office of the recorder of deeds of the county within which the principal office is located, and each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. No assignor of stocks shall be released from any such indebtedness by reason of any assignment of his stock, but shall remain liable therefor, jointly with the assignee, until the said stock be fully paid. Whenever any action is brought to recover any indebtedness, against the corporation, it shall be competent to proceed against any one or more stockholders at the same time to the extent of the balance unpaid by such stockholders upon the stock owned by them, respectively, whether called in or not, as in cases of garnishment. Every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon, to the extent and in the same manner as if he had been the original subscriber.

§ 13. If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto, shall be personally and individually liable for such excess to the creditors of such corporation.

APPENDIX S.

EXTRACTS FROM THE REPORT OF THE DEPARTMENTAL COMMITTEE APPOINTED BY THE BOARD OF TRADE TO ENQUIRE WHAT AMENDMENTS ARE NECESSARY IN THE COMPANIES ACTS, 1862-1890. cd. 7779, 1895.

Loading of
purchase money.

27. In addition to allotment on insufficient subscription the typical cause of failure and of loss and disaster to shareholders is the loading of the purchase money (when a Company is formed to purchase an existing business), or of the contract price (when the Company is formed to construct and work an undertaking such as a railway, etc.), and the consequent over capitalization of the concern. This may be done in various ways. Take the case of a Company to be formed for the purchase of a going concern. The

promoter obtains from the proprietors of a business a contract, or not unfrequently an option (which is only an offer) to sell their business for a price usually payable partly in shares or debentures of the Company to be formed. The promoter frequently forms a syndicate which is registered as a corporate Company, and purports to sell to it the contract or option at an enhanced price. The syndicate finds a person to act as nominal vendor, with whom they purport to make a contract at again an enhanced price, and lastly the nominal vendor purports to make what is called a provisional contract with another dummy called the trustee for the Company subject to adoption by the Company. In the prospectus the nominal vendor is put forward as a real vendor and the prospectus usually states that he has fixed the purchase money at so much, and will bear all the expenses of the formation of the Company. The purchase money of the real or ultimate vendor (in the case supposed) is thus enhanced before the property reaches the Company by (1) the profit of the original promoter (2) the profit of the syndicate or intermediate promoters (3) what are called the expenses of formation, which usually include, in addition to the expenses of registration and ordinary expenses of formation, fees to brokers and other persons engaged in promotion and commission on underwriting. It is obvious that the so-called contract with the nominal vendor (who is now a standing character in the *dramatis personæ*) and the provisional contract with the trustee for the Company, are not real contracts, although they assume that form, for both vendor and purchaser are nominees of the promoters. The documents are at the most statements of the terms on which the promoters are prepared to admit persons to association with them in the benefit of the contract or option obtained from the real vendor. If all this were done openly, and the persons who are asked to subscribe were made acquainted with the real situation, and were told that the so-called vendor is a man of straw, and that the so-called contracts are only machinery for securing payments out of the Company's money to the promoters and underwriters and their friends, there could be no legal objection. If people with knowledge of the facts like to embark on an undertaking for which they are paying, say, twice as much as the real and present owners of it are willing to sell it for, they may be wise or unwise, the speculation may turn out well or ill, but it is their own affair.

28. Your Committee, therefore have endeavoured in the recommendations which they have made to enable the public who are asked to subscribe to a Company to get at the real and ultimate vendor, to strip the mask off the nominal vendor, and to ascertain to whom the price to be paid by the Company is to go, and how it is to be applied, what the real purchase money is, what expenses are to be paid, and what will be left to the Company for working capital. Recommendations
of committee.

29. Your Committee pass by cases of wilful misrepresentation and deceit in the prospectus. If once the facts are ascertained, and the people are willing to pursue their remedies, the ordinary law is sufficient to cope with such cases by an action of deceit against those responsible for the prospectus, or an action for rescission of contract against the Company, or an indictment for conspiracy to defraud.

Suggested provisions as to the first statutory meeting.

39. Section 39 of the Act of 1867 requires under penalties a general meeting to be held within four months after registration of the Memorandum of Association, but the Act does not specify what is to be done at the meeting, or require any information to be given to the shareholders at it. The consequence is that either the shareholders do not attend, or if they do so, no business, or only formal business is transacted at the meeting. Your Committee attach importance to their recommendations for making this first statutory meeting a reality and utilizing it for enabling the shareholders, if they think fit to do so, to review their position and prospects. For this purpose your Committee recommend that a full statement or report, certified by at least two directors of the Company, and as to certain financial matters by the auditors, be prepared and forwarded to the shareholders at least seven days before the meeting. In this report the directors will be required to state their views on the position and prospects of the Company, and in particular whether they have any reason to question the good faith of the undertaking or the truth of the statements in the prospectus, or (if they cannot so report) to state the conclusions at which they have arrived and the advice they have to offer. This report may be compared with the report required by German law at the initial state of the Company's existence, but in the opinion of the Committee it may be made more effectually, and therefore more usefully, at the first statutory meeting than at any other stage. The shareholders will thus be in possession of a report guaranteed by the signatures of at least two directors, and as to certain matters, of the auditors, and they may at their meeting discuss the report, appoint a committee of investigation, and, if it appears that there are any legal grounds for claiming rescission or reformation of the contracts upon which the Company's undertaking is based, take that course, or they may resolve to wind up the Company at once. They also recommend that the terms of contracts stated in the prospectus shall not be altered except by a general meeting.

40. A proposal was made by a member of your Committee that no moneys out of the funds of the Company should be paid away in completion of a contract with promoters or vendors until after the conclusion of the statutory meeting. This proposal has an attractive appearance. It was supported as a corollary of the clauses adopted by your Committee respecting the statutory meeting. Without such a provision, it was urged, any action by shareholders founded on the report laid before the statutory meeting might be ineffectual and useless, as the funds might in the meantime have disappeared and become irrecoverable. The proposal was very fully discussed in all its bearings and particularly with reference to a consequential amendment entitling a single shareholder or a specified minority to sue for rescission of contracts with the Company. In the result your Committee were of opinion that it could not be adopted with justice to all interests concerned and that it would be impracticable. To postpone the completion of contracts until after the statutory meeting would obviously enable a hostile and unscrupulous or discontented section of the shareholders by litigation which might in the end prove utterly unfounded, indefinitely to delay completion and thereby wreck the enterprise,

or at any rate enable an unjustifiable pressure to be put upon vendors. Why, it was asked, should we hamper and embarrass the completion of honest contracts in the majority of cases in order to prevent a problematical wrong in the small minority? It may be added that at the date of the statutory meeting only a small portion of the subscribed capital would in the usual course have been paid up, and the danger anticipated is not, therefore so great as it appears.

41. In order to enable the members of a company to exercise an effective control over the concerns of the Company the Committee think that it is desirable to invest a substantial proportion of the members (say one-tenth in value) with power to enforce the holding of a general meeting whether for the alteration of the regulations or otherwise. Fairly framed regulations always contain such provisions.

Suggested provisions for special general meetings.

42. Your Committee may observe that they have dismissed from their consideration every suggestion for a public inquiry by the registrar or other official authority, into the soundness, good faith, and prospects of the undertaking at this or any other stage of a company's formation. To make any such investigation into the position of every new company complete or effectual would demand a very numerous staff of trained officers, and lead to great delay and expense, while an incomplete or perfunctory investigation would be worse than none. It would be an attempt to throw what ought to be the responsibility of the individual on the shoulders of the State, and would give a fictitious and unreal sense of security to the investor, and might also lead to grave abuses.

Official supervision of formation of companies inadmissible.

43. There is no subject of greater importance connected with the administration of companies or on which your Committee have been favoured with more suggestions than the question of the restrictions and limitations to be placed on the powers of a company to mortgage its property. Objections have been made to the power of a company to charge its unpaid or uncalled capital, or to create what are known as floating charges over its assets, or to mortgage its future book debts or chattel property, and there is a nearly unanimous demand for an efficient register of a company's mortgages, or at any rate of certain of its mortgages. Suggestions have also been made for limiting the borrowing powers of a Company to certain fixed proportions of subscribed or of paid-up capital. Your Committee, however, are of opinion that it would be impracticable to attempt to fix any such proportion.

Borrowing powers of companies.

44. The incorporation of a Company, whereby it is made a separate person in law from the members who constitute it, renders it legally possible for a company to mortgage the contributions which its own members are liable to make towards payment of its debts. The courts, however, in the earlier cases felt some hesitation in holding such a charge to be valid under any circumstances. In more modern cases it was held to be valid where it was authorized by the Memorandum and Articles of Association. At length in the case of the Pyle Works, Ltd. (44 ch. D 534) the point was fully argued, and the validity of a charge on future or unpaid capital was established by the Court of Appeal. The same view has

Mortgages of uncalled or unpaid capital.

recently been expressed by the Judicial Committee in a Colonial Appeal. (*Newton v. Debenture holders, &c.*, of the Anglo-Australian Investment, &c., 1895, App. Ca., 244).

45. The frequency with which such a charge is made a security for money borrowed on debentures seems to shew that it is a form of security found useful by borrowing companies and appreciated by investors. The possibility of such a charge being effected is known to creditors; and, provided means be adopted for securing an efficient register of such charges open to the inspection of all creditors and persons asked to give credit to a company, your Committee are not disposed to recommend any alteration in the law as settled by '*In re the Pyle Works, Ltd.*' The same reasoning has determined them not to recommend the prohibition of floating charges on a company's assets, the validity of which has been frequently affirmed in the courts.

Existing provisions as to registration of mortgages.

46. By Section 43 of the Act of 1862, every limited company is bound to keep a register of all mortgages and charges specifically affecting property of the Company, and to enter in such register a short description of the property mortgaged or charged, the amount of the charge, and the names of the mortgagees. The register of mortgages so required is open to inspection by any creditor or member. Penalties are imposed on directors, etc., who omit to make an entry of mortgages or who refuse such inspection.

47. It will be seen that this section provides for the registration of all mortgages or charges specifically affecting any property of the Company without any exception; but the section is directory only, and the omission to register does not affect the validity or priority of the mortgages. It was at one time held that a director could not set up an unregistered mortgage against the company's general creditors, but this has been overruled. The only sanction is a penalty on the directors for omitting to register. The register is not open to inspection by any person until he is already a shareholder or creditor. The section has become almost a dead letter. It was stated in the course of the discussions in your Committee that many companies, even amongst the largest and best-managed, keep no register at all. It may perhaps be thought that the limited extent to which creditors avail themselves of such rights as are given by the existing law indicates that the demand for further disclosure is more theoretical than practical, but in answer to this it should be observed that creditors are not likely to avail themselves of their right of inspection at the Company's office if they desire to retain business connections with the Company. It should be added that charges on the chattels of a Company when made a security for debentures of a company are exempted by section 17 of the Bills of Sales Act, 1882 (as construed by the Courts), from the provisions of that Act.

48. The law does not provide, except in Middlesex and Yorkshire, for the registration of mortgages on real estate in England. nor does it require the registration of mortgages on book debts or any personal estate other than 'chattels' within the meaning of the Bills of Sales Acts. It is thought by some that to require joint stock companies, and particularly banking companies, to register

any such mortgages as an individual trader is not required to register, would unfairly handicap them in competition with individuals and unincorporated firms carrying on a similar business; while others are of opinion that companies in this respect occupy a different position from individuals, not being restrained from the use of reckless or excessive credit by the penalties of the bankruptcy law; and that therefore it is desirable that all mortgages of whatever character, except such as are given in the ordinary course of the Company's business, ought to be registered. It is generally admitted that there are liens, mortgages, and charges of daily occurrence in the usual transactions of business which it would be inconvenient to register, and the validity of which should not be dependent on their registration.

49. Your Committee recommend that a public register of mortgages be kept at the Joint Stock Registry Office, and that all charges on uncalled or unpaid up capital, and all floating charges, and all securities for any series of mortgage debentures, and all mortgages on chattels which would require registration under the Bills of Sales Acts if made by an individual trader, should be registered; but they do not recommend a general register of all mortgages and charges made by a company. They also recommend that any unregistered mortgage or charge requiring registration be invalid as against liquidators and creditors. This will make it the interest of the mortgage holder to see to registration. And they recommend that the register be open for public inspection, and that a chronological index be kept of such mortgages so as to make the information afforded by the registrar more easily accessible. There are some further details which the Committee have suggested for the protection of debenture holders.

Suggested
provisions
as to
registration of
mortgages.

50. Your Committee observe that a registration such as proposed by them will render it unnecessary to bring debentures secured on chattels within the provisions of the Bills of Sales Acts, as was suggested in one of the clauses of the draft Bill. And, indeed, the Committee would hesitate to extend to such securities the provisions of those Acts, which are not in form well adapted for the purpose. Nor do they think it necessary to restrict a company from mortgaging future chattels or book debts. The balance of opinion as shewn in the replies made to your Committee seems to be in favour of the retention of such a power, provided there be sufficient registration. The law of Scotland with respect to mortgages will, of course, be unaffected.

EXTRACTS FROM A MEMORANDUM OF QUESTIONS
UPON EVIDENCE AS TO THE LAW OF FRANCE IN
RELATION TO COMPANIES. PREPARED BY T. GIR-
WOOD MACFIE, SECRETARY OF THE COMMITTEE,
APPENDIX to ed., 7779—1895.

Definite
constitution.

It is observed also that Article 1 provides that Sociétés en Commandite are not definitely constituted or capable of carrying on business until the whole of the capital has been subscribed, and at least one-fourth of each share actually paid up. It is not clear, however, whether the preliminary matters in respect to the formation of the Company require registration in any way, or whether the declaration under Article 1 as to the subscription and payment sufficient for definite constitution is the first document deposited with the justice of peace, and at the tribunal of commerce. Article 24 applies Article 1 to Sociétés Anonymes, but provides also that the deposition required of the manager by Article 1 shall be made by the founders (promoters) of the Société Anonyme, and shall be submitted, together with the documents in support thereof, to the first general meeting which shall examine into its correctness. It appears to be clear that neither class of Société is capable of carrying on business or of having a potential existence until the complete membership has been obtained, and one-fourth of the share capital paid up. Is this provision for completion of membership and payment of 25 per cent, of the substantial capital before definite constitution, approved of or objected to in practice, and how does it work generally? What provision is made as to the custody of the payment of the quarter of the share capital, which must be paid up before definite constitution, and is the amount returned in full if the Company proves abortive? Do these provisions prevent substantially the formation of abortive companies with insufficient capital, *i. e.*, of companies with a capital so much less than that offered for subscription that failure and loss to the subscribers is inevitable.

EXTRACTS FROM A MEMORANDUM BY MAITRE
EDOUARD CLUNET, AVOCAT A LA COUR DE PARIS,
IN ANSWER TO THE QUESTIONS OF MR. MACFIE.
APPENDIX to ed., 7779—1895.

(2) Do the provisions relating to the complete formation of the company, and to the paying up of one-quarter of the subscribed capital prevent the creation of fraudulent or abortive companies, or are not these provisions evaded in practice with impunity by means of collusive subscriptions and payments, or by creating at first a company with a small capital and augmenting it afterwards?

Are not these provisions an obstacle to the formation of good companies?

(Reply).—The ingenuity of unscrupulous financiers has, in fact, often furnished the means of evading these legal provisions, in the same manner as all the other legal provisions as to companies are evaded.

We have often seen companies floated, whose principal assets consisted of false statements in their prospectuses, with a more or less substantial capital; but with the secret intention, when once constituted, not to increase the share capital, but merely to make use of the unlimited power to issue debentures-bonds to take the place of the absent working capital.

This evasion in order to obtain money from a credulous public has been very often employed, and it is this unlimited right to issue debentures, and the crying abuse which has been made of it, that ought to be remedied.

Notwithstanding that, we do consider the formalities aforesaid as protecting the public in a certain measure, and, in any case, as not forming an impediment to the constitution of *bonâ fide* companies. These formalities have been, in imitation of the Law of France, adopted by the Belgian Law of the 28th May, 1873, but, with this modification, that the amount of compulsory payment upon subscription is not one-fourth, as in France, but only one-twentieth of the capital, and consists of cash.

By the new Law of the 1st of August, 1893 (Article 2) the total amount of the share capital has to be entirely subscribed whatever may be the total amount of share capital, but the amount which has to be paid up differs according to the nominal value of the share. If the shares are of the value of 25 francs (share capital of 200,000 francs or below) the payment of the whole amount is required.

If the shares are of 100 francs or above, a deposit of one-fourth only is required.

The new Law says nothing about shares between 25 and 100 francs. Ought the shares to be fully paid up, or only to the extent of one-fourth? The point is a moot one amongst writers, and the Courts have not yet had occasion to decide it.

Under the regulations of the Law of 1867, the decisions of our Courts admitted that the deposit of one-fourth need not be paid in money, and decided that there might be used in the place of money, property which can be easily and safely realised, such as Treasury bonds payable at sight, cheques, coupons which had fallen due, etc. It was also decided that it could be satisfied by payment of the balance where the subscriber who had to make a payment to the Company, was at the same time its creditor. These decisions have been found too lenient by our legislators, and they wish to exclude from the deposit required before the formation of the Company all payments made otherwise than in cash or notes of the Bank of France. I may perhaps be permitted to state that, in my opinion, the new Law has on this point shown excessive stringency.

(3) What are the provisions of the law relating to the payment of one-fourth pending the formation of the Company? \

In whose hands do these payments remain pending the completion of the formalities of constitution?

Are the sums deposited restored where the company turns out abortive?

(Reply).—During the formation of the Company the provisions relating to the payment of the quarter are that the promoters should hold the money received by them in payment of one-fourth of the shares, and that they should act as managers of the business during the formation of the company. Unless there be a stipulation in the prospectuses or in the articles of association (stipulations which

perhaps do not exist save in very rare cases) the funds ought to be retained in the hands of the promoters of the company until the formation of the company is complete. In any case the subscriber should not retain them, and in default of the promoters the sums ought to be held by a third person. In practice the money is deposited with the notary who has drawn up the deed incorporating the company, either in a public place for the deposit of money (Caisse publique), or in a bank.

The International Congress of Joint Stock Companies held at Paris during the Exhibition in 1889, passed the following resolution (No. 5, second paragraph):—

‘In order to insure the *bonâ-fide* character of the subscriptions and payments, the place of payment should be a public place for the deposit of money* (Caisse publique). (See Journal of Clunet, 1890, p. 179.)’

It is unquestionable that if the company cannot be floated on account of the lack of subscribers, the subscribers should have their money repaid, as the condition of payment, that is to say, the formation of the company, has not been fulfilled; and this applies even where there is a provision in the prospectus or a clause in the articles that, in the absence of subscribers for all the shares, the company shall nevertheless be formed among the subscribers to the first issue. Unless otherwise stated in the prospectus, the repayment should be of the whole sum. The costs of subscription ought to be borne by those who have presented themselves to the public as the promoters of the Company.

(4) Do the provisions of the law relating to meetings, and to the inquiry and report upon the ‘apports’ prevent fraud?

Do they not prevent, on the other hand, and without any benefit being derived therefrom, the formation of *bonâ-fide* companies?

(Reply).—The system of the Law of 1867 for the verification of ‘apports’ in kind has been violently attacked. The legislature is reproached with only allowing the shareholders to intervene when things are no longer intact, that is to say, at a time when the shareholders, having already paid up one-fourth of their subscription, are less disposed to investigate the real existence of the ‘apports’ than if the verification had taken place before they had paid up anything.

The recent case of the Décauville Company proves that shareholders allow themselves to be too easily taken in by untrue statements of interested parties.

The Belgian Law of the 18th May 1873 (Articles 31 and 32) is often cited as a precedent on this particular point. However, this may be, the provisions of the Law of 1867 on this point are defective. An endeavour was made to remedy them in the Bill adopted by the Senate at the sitting of the 29th November 1884 (Articles 7, 11, and 13). That Bill was, however, not adopted by the Chamber of Deputies, and the recent Law of the 1st August, 1893, does not contain any provision under this head. (See next page in reply to Question 6).

Beyond this, it does not seem that the provisions of the Law of 1867 prevent the formation of *bonâ-fide* companies. How could

* N.B.—The only thing analogous to this in England is the Bank of England as a place for the deposits of payments into court.

it be otherwise, as the meetings called to verify the 'apports' have nothing to do but to verify matters of fact?

(5) Do the provisions of the law relating to the election of first directors and officials (Articles 25 and 32) by a general meeting really insure some voice to the subscribers in these elections?

Are not they carried out sometimes in a fraudulent manner by the promoters so arranging at these meetings as to secure the election of their nominees?

(Reply).—It seems that the provisions of Articles 25 and 32 may really insure some voice to the first subscribers in the election of the directors and first officials; but in this case fraud can easily be introduced, because, necessarily, the promoters, who know each other, have always a preponderance at the first meetings at any rate; besides, when we inquire into the practical bearing of Articles 25 and 32, it must be remembered that, in virtue of Article 25, paragraph 3, the first directors may be named in the articles without this selection having to be ratified by a general meeting of the shareholders. It ought also to be remembered that the directors are always eligible for re-election after the expiration of their term of office, and that, unless evidence of fraud comes to light, the shareholders are usually ready to retain in office those who have the advantage over the other candidates of having been in office.

The subscriber to a new company exercises his right to vote at the election for the first directors with less care, as he very often becomes a shareholder, not to make a *bonâ-fide* investment as a family man, but only with the idea of immediately selling at a premium, the share he has subscribed for, and of realizing the increase in value. Under these conditions the future of a company, the good management of which depends upon the choice of directors, but from which the shareholder is eager to sell out for a mere speculation, is a matter of indifference to him.

(6) Have the provisions relating to Article 24, giving the subscribers the right to examine the statements of the promoters any practical utility?

(Reply).—The provisions of the last paragraph of Article 24, which are nothing more than the adaptation to companies 'anonymes' of those of Article 1, paragraph 3, relating to companies en commandite, have in practice only a relative utility; in companies 'en commandite par actions' the verification of the payment of one-fourth of the total subscription is made, in fact, by the Committee of supervision, each of whose members is responsible in case of the company being declared void for non-observation of legal formalities; the members of the general meeting of shareholders are such as do not incur any liability in cash, and are therefore less inclined to take the trouble of carefully examining the lists of subscriptions. Add to this the state of mind in which, as a rule, the original subscriber is found whilst the company is being formed, as we have mentioned in paragraph 5.

Since, by virtue of the Law of the 1st August, 1893, shares may be issued of the nominal value of 25 francs and above, and must be fully paid up at the time of application, the verification by the general meeting ought, in this particular case, to relate, not to finding out whether a fourth of the value of the shares has been paid up, but rather to whether the whole amount of the shares has been paid. In view of the unsatisfactory results provided by the provisions of Articles 1 and 24 combined, the Bill as to Companies,

adopted by the Senate at its sitting of the 29th November, 1884, had contemplated certain additional measures, viz., the election of experts to undertake the obligatory verification at the request of one-fourth of the shareholders present, and a statement in the notarial declaration of the place where the sums paid up have been deposited.

The International Congress of Joint Stock Companies, held at Paris during the 1889 Exhibition, voted the following resolution:—

‘The law should prescribe formalities for the verification of the subscriptions, and the apports. Apports in kind should be verified by experts chosen by the Court. A report of this should be prepared for the meeting, which should be made public.’ (Journal of Clunet, 1890, p. 179).

Unfortunately the Law of 1893 did not reproduce these precautionary measures. It was considered sufficient by way of innovation to provide as follows in Article 2:—

‘The shares representing the apports ought always to be fully paid up at the time of the formation of a company. These shares should not be detached from the counterfoil, nor be negotiable until two years after the final formation of the company. During this time they ought to be marked with a stamp by the directors, indicating their nature and the date of the formation of the company.’

This provision has the effect of preventing the shares from being sold upon the Exchange in the ordinary way of business, and it also gives the Company a security upon such shares for any claim which may arise against the sellers of the property or business of which such shares are the price or part of it. It may, however, be evaded, in substance by the promoters agreeing for a cash payment and subscribing for shares at the same time, the liability upon the shares being balanced or set off against the amount due as purchase money. The result is, however, in any event beneficial in tending to prevent the creation of fictitious capital by the issue of shares credited as fully paid up for an insufficient consideration.

EXTRACTS FROM A MEMORANDUM BY ERNEST J. SCHUSTER, JUR. D. (MUNICH) AND BARRISTER AT LAW (LINCOLN'S INN) UPON GERMAN LAW AS TO COMPANIES.

II. FORMATION OF COMPANIES.

(A) CONSTITUTION AND REGISTRATION.

The German law distinguishes between the constitution of a company (see German Mercantile Code,* secs. 209d, 210a) and its registration, the latter being equivalent to incorporation (sec. 211). The effect of the constitution is to make the articles binding on the shareholders, *inter se*, and to ratify any necessary preliminary steps (see Ring Das Reichsgesetz, etc., von 1884, etc., 2nd ed.,

* All references to statutory provisions hereinafter made, in connexion with which a statute is not specially mentioned, are references to the German Mercantile Code.

Berlin, 1892, p. 278); but as between the Company and the outside world the company as such does not exist before registration and any persons purporting to enter into any engagements on behalf of the company before registration are jointly and severally liable for such engagements (sec. 211). It must, however, be pointed out that the doctrine of *Kelmer v. Baxter* (L.R. 2, C.P. 174) is not recognized in Germany, and that agreements entered into on behalf of a Company before registration in accordance with the provisions contained in its articles, and with the intention of becoming binding in the event of the company being formed, do in effect become binding in that event, without any further ratification (see Ring, p. 279, and see *Reichsgerichts-Entscheidungen, für Civil-sachen*, Vol. 24, p. 21, ff).

The following preliminary steps are necessary before a company can be registered:—

- (b) The articles must be agreed upon;
- (c) A managing board and a board of supervision must be appointed.
- (d) The whole of the share capital must be allotted and 25 per cent at least must be paid up;
- (e) Reports on the formation of the company must be made by certain persons, and
- (f) Certain documents must be filed in the registry.

(B) PROVISIONS AS TO ARTICLES.

The articles must be agreed upon by at least five intending shareholders and the agreements must be evidenced by a written contract executed in the presence of a judge or of a notary public (sec. 209). The articles must contain particulars and provisions on the following points:—

- (1) Particulars similar to those required to be contained in the memorandum of a British Company limited by shares. If shares are to be issued at a premium, or if shares are to be issued with preferential rights this must be stated (sec. 209) [1 to 4]; sec. 209a [1 to 4].
- (2) Particulars as to the mode of appointing the managing board and as to the mode of convening general meetings and making public announcements. If special majorities or other special rules are to be required for special business this must also be stated (sec. 209 [5 to 7], sec. 209a [5]).
- (3) Particulars as to any of the following special arrangements in connexion with the formation of the company (which arrangements collectively will hereinafter be referred to by the name of 'Promotion Arrangements'), that is to say, arrangements by which—

I. Special advantages are conferred on any individual shareholders.

II. Shares are issued for any consideration* not being the payment of their full account in cash.

* The consideration must consist in property of some sort; 'something which may be valued as an asset for the purposes of the balance-sheet.' See Official Motives accompanying the draft Bill submitted to the Reichstag in 1884, p. 97.

III. The purchase of property or the construction of works is contracted for.

IV. Remuneration is promised out of the company's funds for services in connexion with the formation of the company (it is sufficient to state the total amount in a lump sum, sec. 209b).

(C) APPOINTMENT OF MANAGING BOARD AND BOARD OF SUPERVISION.†

The mode of appointing the managing board must be provided for in the articles. The Board of Supervision must consist of three members (not necessarily shareholders unless this be required in the articles), or of such larger number of members as the articles may provide, who must in any event be elected by a general meeting (secs. 224 and 191): members of the managing board are not eligible. It is therefore necessary in all cases to have a general meeting of shareholders, and in the case of a 'successive formation' of the company (as to which see below) this meeting must be held before the 'constituent' meeting.

(D) PROVISIONS AS TO SHARE CAPITAL.

A. Allotment of shares.

The share capital may be placed in two different ways, (1) the promoters (which expression is legally defined as including the shareholders who have signed the articles or to whom shares are issued for any consideration not being payment of their nominal amount in cash (sec. 209c), may take up all the shares ('simultaneous formation'), in which case the company is 'Constituted' as soon as the shares have been subscribed for (sec. 209d); (2) the promoters may take up part of the shares only, and issue the remainder to other persons, who are required to sign forms of application containing certain particulars, and who must pass a resolution at a meeting to be convened for that purpose by the local court, by virtue of which the 'constitution' of the Society is effected (including the particulars as to 'Promotion arrangements').

signed in duplicate, and must contain the following particulars:—

(1) The date of the articles and certain parts of their contents (including the particulars as to 'Promotion arrangements').

(2) The names, addresses, and descriptions of the promoters.

(3) The amount of the share capital and particulars as to calls.

(4) The date on which the application ceases to be binding, unless the 'constitution' of the company has been previously resolved upon.‡ Forms of application not complying with these requirements are void; but if, notwithstanding this fact, a company is registered, a shareholder who has otherwise acted as such, cannot avail himself of such invalidity (sec. 209z).

The constituent meeting, which is presided over by the local judge, must receive statements from the two boards as to the result of their examination of the circumstances attending the formation of the company (which examination must have been made before

† As to the duties of these Boards see below.

‡ According to German Mercantile Law, the application could not be withdrawn before that date.

the date of the meeting, sec. 209h), and the 'constituent' resolution must be passed by a majority formed of shareholders whose number equals at least one-fourth of the total number of shareholders, and whose holding is at least one-fourth part of the share capital (sec. 210a).

B. Nature and amount of shares. Payment of first call.

In the great majority of cases shares in German companies are issued in certificates to bearer; but the name of 'shares' is also given to the certificates of title issued to the holders of registered shares. These certificates cannot in either case be issued until the shares are paid up in full; but interim certificates, which must always be registered in the name of the holder, are issued prior to that time. The amount of any shares or interim certificate must as a general rule not be less than 50 L., but shares for smaller amounts (not being less than 10 L.) may in certain exceptional cases be issued, subject to the consent of the Federal Council, and registered shares, being transferable with the consent of the company only, may in all cases be issued in amounts not being less than 10 L.

The payment of the 25 per cent required to be paid up before registration must be made in coin or legal tender notes (sec. 210). Payment by set-off or transfer in the books of a banker is not sufficient (Ring, p. 257; Hergenhausen Das Reichsgesetz, etc., von 1884, Berlin, 1891, p. 63. Makower, Das Allgemeine Deutsche Handelsgesetzbuch, 11th ed., Berlin, 1893, p. 219); and at the time of the registration of the company the money received in respect of the first call must be in the possession of the managing board. Payment to a third person approved of by the managing board, who undertakes to hold the money at the disposal of the managing board, is sufficient (Decision of the Reichsgericht, Bolze, vol. 9, p. 219, quoted by Ring, p. 257). Any premium payable on the shares must be paid in addition to the 25 per cent (sec. 210).

(E) REPORTS AS TO CIRCUMSTANCES OF PROMOTION.

In all cases in which shares are issued for any consideration, not being payment in full in cash, or in which contracts for the purchase of property or the construction of works have been entered into, the promoters (see definition given above on p. 5) must sign a declaration (hereinafter called the 'Promoters' declaration'), in which they must state on what grounds the prices agreed to be given for such property or works appear to be justified. The declaration must include a record of all transactions during the two years preceding the registration relating to such property or works (sec. 209 (g)).

Each of the members of the managing board of supervision has to examine the promoters' declaration, and to test the accuracy of the statements therein contained, and they must also make an independent inquiry as to all the incidents of the formation of the company (including the allotment of the shares and the payment of the first call). The result of these inquiries must be embodied in written reports. One report, if signed by all the persons concerned, is sufficient. (Ring, p. 243).

In case any member of either board is a promoter, vendor or contractor, independent auditors must be appointed, who must examine and report separately. These auditors must be appointed by the Chamber of Commerce* or other local body, representing the trading interest in the place in which the company is to be registered; but, if such body is non-existent, the two boards must appoint them.

(F) DOCUMENTS TO BE FILED IN THE REGISTRY.

Registers for mercantile purposes are kept by the local courts, and the entries made therein, as well as the documents filed in connection therewith, are open for public inspection (sec. 13). Moreover the *Imperial Gazette* has a separate part published under the title of 'General Register for Mercantile Purposes,' in which extracts from all entries in the local registers are given.

The articles must be entered in the register and the following documents must be filed:—

1. The promotion agreements, the promoters declaration, and a detailed statement as to the promotion expenses.
2. In the case of a 'successive formation', the duplicate letters of application and a list of shareholders, which must be signed by the promoters. ,
3. The documents relating to the appointment of the two boards, the reports required to be made as mentioned above, and all exhibits to which they refer.
4. Companies intending to carry on any business requiring a Government license (Railways, Hotels, etc.), must file the license; and companies wishing to issue shares of an amount requiring the authorization of the Federal Council must file the authorization.

These documents must be accompanied by a written application, to be signed by each of the promoters and each of the members of both boards, requiring the company to be registered, and declaring that the proper amounts were paid up in cash, and are in the possession of the managing board (sec. 210).

The local court must publish an extract of the articles, containing, among other things, the particulars as to promotion agreements (sec. 210 C.)

(G) OBSERVATIONS AS TO THE EFFECT OF THE FORMATION OF COMPANIES.

The fear that the somewhat complicated provisions referred to above might stop the formation of new companies has proved to be unfounded, as will be seen from the statistical information given below. There was, in fact, in 1889 an extension of company enterprise, which almost recalled the reckless period of 1871 and 1872; but, as in the latter case disastrous results were discernible almost immediately, whilst the inflation of 1889 has not as yet produced any mischievous effects, it is not an overbold inference to

* These are bodies elected in different places by the constituencies provided for by local by-laws, consisting mostly of the general body of traders. They are frequently consulted by the governments on matters affecting trade, and the provision requiring them to appoint the auditors is partly based upon the view that the interest most concerned in securing a proper audit is that of the mercantile community from whom such companies invite credit upon limited liability. As to the practical effect of these provisions, see post, page 9. (Observations as to the effect of the provisions relating to the formation of companies.)

assume that the safeguards of the Statute of 1884 have been found successful.

It is no doubt true that persons proposing to commit frauds may occasionally succeed in evading the provisions of the Act, but fraud has been made more difficult and more easy of detection and proof. Where no particulars are required, frauds are possible without any materials being left to show the means by which they have been effected; whilst, if information is required to be filed, the promoters must at least commit themselves to definite recorded misstatements in order to effect their purposes. The number of persons who will deliberately sign their names to untrue or evasive statements is much smaller than the number of those who, not being required to make any such statements, are inclined to take a somewhat lax view as to the morality of transactions from which profits are derived.

The prohibition of small shares was looked upon with great misgivings, but the public seem to have adapted themselves to the new rules very quickly; and the Imperial authorities, who are at the present moment revising the Mercantile Code, are already considering the question of whether the limit should not be raised. Useful material on this question is to be found in the evidence taken by the Imperial Commission appointed to inquire into the abuses of the Stock Exchange, which examined a number of witnesses as to the proposal to impose a similar limit on foreign securities. The objections against the proposal were almost entirely based on the fear that international dealings might be hampered by such a measure, but not one of the witnesses stated that any undesirable results had been produced by the restriction as to shares. As nearly all the witnesses were persons engaged in Stock Exchange transactions, and most of them showed a strong bias against State interference, this negative evidence is not without importance (see Shorthand notes pp. 405, 634, 1115, 1116, 1506, 1912, 3504, and *passim*). The proposal was eventually dropped by the Commission, the numbers being equally divided on the question (see Minutes of Proceedings, p. 410).

Some danger arises from the fact that most companies are formed on the 'simultaneous plan'* the promoters in many cases offering the shares to the public at a high premium. This was also one of the points considered by the Imperial Commission on Stock Exchange abuses and several of their recommendations are intended to deal with it. They recommend that shares should not be allowed to be quoted on the Stock Exchange without the publication of prospectuses, and that the liability for the correctness and completeness of prospectuses (as to which see below) should be extended, so as to give a right of action to any original taker or subsequent purchaser of shares (see Minutes of Proceedings, pp. 385 and 388). In order to obviate the rush for shares which is frequently stimulated by artificial means when private undertakings are converted into companies, they further recommend that on such occasions 12 months should be allowed to elapse before the grant of a quotation and of permission to deal in the shares on any German Stock Exchange (Minutes, p. 387).

The official auditors' reports, required in the case of any member of either board being a promoter or vendor, do not seem to have

* Out of the 1,482 companies formed in the years 1885 to 1893, only 155 adopted a 'Successive formation.'

been very satisfactory on the whole. The chief difficulties which have been mentioned are the following: that in many places there are no Chambers of Commerce, or similar bodies, which necessitates the appointment of the auditors by the boards; that, where there are Chambers of Commerce, the persons suggested by the promoters are frequently taken; that there are no legal provisions as to the payment of fees; and that the rights and responsibilities of the auditors are not strictly defined. Many proposals have been made for altering this state of things, *e. g.*, that, where there is no Chamber of Commerce, the neighbouring Chamber should appoint; that the auditors should be taken from a rota of qualified persons; that their fees should be fixed by law; that they should be sworn in the same manner as experts in judicial proceedings, etc. It has also been proposed that auditors should be appointed in all cases and irrespectively of the question whether any promoters are on either board or not (see Hergenbahn, XXXIX to XLVI; Sattler Revision bei Gründung von Aktiengesellschaften, Berlin, 1893; Wochenschrift für Aktienrecht III, pp. 88, 390; Imperial Commission, Shorthand Notes, pp. 406, 1330, private letter from Dr. Riesser, December, 1894).

In the case of small companies and companies of a more private nature, the formalities required by the Act of 1884 were found too cumbrous and expensive, and a new form of association adapted to their needs was provided by the Act of 1892 relating to partnerships with limited liability (as to which see post.)

III. ORGANIZATION AND MANAGEMENT.

(A) THE TWO BOARDS.

One of the features of the Act of 1884, to which most importance was attached, was the distinction between the functions of the managing board and those of the board of supervision. Members of the former board and all officers of the company are excluded from the latter. (Official Motives, p. 142, sec. 225). The managing board is the executive organ of the company, and represents it in its transactions with the outside world. Any limitation of their authority, though binding as between them and the company, does not affect third parties (secs. 230-231). The members of the board may be dismissed at any time (without prejudice to any claim for damages to which they may be entitled) (sec. 227), but third parties without notice are entitled to assume that no change in the constitution of the board has taken place until a notification has been entered in the register (sec. 233; sec. 228).

The members of the board of supervision have to watch the proceedings of the managing board, and may at any time inspect any books or securities. They must examine the yearly accounts, and report thereon to the general meeting; and it is their duty to convene general meetings whenever this may be necessary in the interest of the company; a member is not entitled to delegate any of his powers (sec. 225).

It was thought that this strict separation of duties was expedient in view of the fact that persons not actively engaged in the management of a company were less likely to be carried away by

momentary impulses, and had not the same inducements to conceal the effect of transactions which had proved unsatisfactory. (Official Motives, pp. 142-146).

I do not think it is necessary or desirable to attempt to limit the borrowing or mortgaging powers of companies either to an amount proportioned to the capital, or to such a maximum amount as to be actually determined by the shareholders and disclosed by registration. As regards the latter provision, I do not understand that there is at present anything to prevent the shareholders of the company from limiting the borrowing powers of directors to a certain maximum amount; and I take it that any resolution to that effect would, as a matter of fact, be registered. So long as disclosure of mortgages is made essential to their validity as against creditors, and so long also as they are permitted to operate as against creditors only as security for the amounts actually advanced, it seems to me that there is no necessity to limit a company's borrowing powers in any way whatever. Nor do I think that such a provision would be of the slightest utility, because, if the borrowing powers were, for instance, limited to two-thirds or even one-half the amount of the paid-up capital, I think it is clear that the result in the case of insolvent companies would be that mortgages to that extent of the paid-up capital would be quite sufficient to absorb the whole of the existing assets. The only effective provision would appear to be to say that mortgages given by a company, whatever their amount, should effect only a certain proportion of the assets of the company, leaving the remaining proportion available for the general creditors; but such a provision would obviously be extremely difficult to put into operation, and I cannot see the necessity for it so long as such mortgages are disclosed by immediate registration, so that any debts afterwards contracted are contracted with due notice of their existence. As regards limiting the borrowing powers of a company apart from borrowing upon mortgages, I am unable to see any distinction between liabilities in respect of money borrowed, and liabilities in respect of bills accepted, or goods obtained upon credit; and I think that it is quite impossible to limit a company's borrowing powers, unless it is also provided that the power of the company to incur liabilities of any sort should be limited to a certain amount of the capital, leaving, I presume, the directors personally liable for any excess. Whatever may be said in favour of such a view, it is clear, I think, that the system would not be limited liability; and, taking the principle of limited liability by registration as the foundation of the inquiry, it follows that the question for consideration is not whether some new principle practically of unlimited liability, or of *en commandite* companies, should be established, but rather what additional conditions are necessary to be attached to the system of limited liability to prevent its being abused to the detriment of creditors and the public.

Limitation of
borrowing
powers.

APPENDIX T.

COMPANIES CONSOLIDATION ACT, 1908.

THE UNITED KINGDOM.

First
statutory
meeting of the
company.

65. (1.) Every Company limited by shares and registered on or after the first day of January nineteen hundred and one shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company which shall be called the statutory meeting.

(2.) The directors shall, at least seven days before the day on which the meeting is held, forward a report (in this Act called 'the statutory report') to every member of the company and to every other person entitled under this Act to receive it.

(3.) The statutory report shall be certified by not less than two directors of the company, or, where there are less than two directors, by the sole director and manager, and shall state—

- (a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;
- (b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;
- (c) an abstract of the receipts of the company on account of its capital, whether from shares or debentures, and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company;
- (d) the names, addresses, and descriptions of the directors, auditors (if any), managers (if any), and secretary of the company; and
- (e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval together with the particulars of the modification or proposed modification.

(4.) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, be certified as correct by the auditors, if any, of the company.

(5.) The directors shall cause a copy of the statutory report, certified as by this section required, to be filed with the registrar of companies forthwith after the sending thereof to the members of the company.

(6.) The directors shall cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7.) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8.) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9.) If a petition is presented to the court in manner provided by Part IV. of this Act for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10.) The provisions of this section as to the forwarding and filing of the statutory report shall not apply in the case of a private company.

Prospectus.

80. (1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus. Filing of prospectus.

(2.) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar of companies on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3.) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4.) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5.) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so filed.

81. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state— Specific requirements as to particulars of prospectus.

(a) the contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and

- (b) the number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and
- (c) the names, descriptions, and addresses of the directors or proposed directors; and
- (d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted; and the amount, if any, paid on the shares so allotted; and
- (e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued; and
- (f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor; Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors; and
- (g) the amount (if any) paid or payable as purchase money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and
- (h) the amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission; Provided that it shall not be necessary to state the commission payable to sub-underwriters; and
- (i) the amount or estimated amount of preliminary expenses; and
- (j) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and
- (k) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected; Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the Company, or to any contract entered into more than two years before the date of issue of the prospectus; and
- (l) the names and addresses of the auditors (if any) of the company; and
- (m) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property

proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or, otherwise for services rendered by him or by the firm in connexion with the promotion or formation of the company; and

(n) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2.) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(a) the purchase money is not fully paid at the date of issue of the prospectus; or

(b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(c) the contract depends for its validity or fulfilment on the result of that issue.

(3.) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression 'vendor' included the lessor, and the expression 'purchase money' included the consideration for the lease, and the expression 'sub-purchaser' included a sub-lessee.

(4.) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(5.) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them.

(6.) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(a) as regards any matter not disclosed, he was not cognisant thereof; or

(b) the non-compliance arose from an honest mistake of fact on his part:

Provided that in the event of non-compliance with the requirements contained in paragraph (m) of sub-section (1) of this section no director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

(7.) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to any prospectus

whether issued on or with reference to the formation of a company or subsequently.

(8.) The requirements of this section as to the memorandum and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

(9.) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

Obligations
of companies
where no
prospectus
is issued.

82. (1) A Company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

(2.) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight.

Restriction
on alteration
of terms
mentioned in
prospectus
or statement
in lieu of
prospectus.

83. A company shall not previously to the statutory meeting vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the statutory meeting.

Liability for
statements in
prospectus.

84. (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorised the naming of him and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith unless it is proved—

- (a) With respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true; and
- (b) With respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation. Provided that the director, person named as director, promoter, or person who authorised the issue of the prospectus, shall be liable to pay compensation as aforesaid if it is proved that he had

no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and

- (c) With respect to every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document; or unless it is proved—
 - (i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
 - (ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or
 - (iii) that after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2.) Where a company existing on the eighteenth day of August one thousand eight hundred and ninety, has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein, unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3.) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

(4.) Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section may recover contribution, as in the cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5.) For the purposes of this section—

The expression ‘promoter’ means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company:

The expression ‘expert’ includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

Allotment.

Restriction
as to
allotment.

85. (1) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely:—

- (a) the amount (if any) fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or
- (b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription, has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company.

(2.) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

(3.) The amount payable on application on each share shall not be less than five per cent of the nominal amount of the share.

(4.) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per centum per annum from the expiration of the forty-eighth day:

Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5.) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6.) This section, except subsection (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7.) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say):—

- (a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or
- (b) If no amount is so fixed and named, then the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash.

has been subscribed and an amount not less than five per cent of the nominal amount of each share payable in cash has been paid to and received by the company.

This subsection shall not apply to a private company or to a company which has allotted any shares or debentures before the first of July nineteen hundred and eight.

86. (1) An allotment made by a company to an applicant in contravention of the provisions of the last foregoing section shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

Effect of
irregular
allotment.

(2.) If any director of a company knowingly contravenes or permits or authorizes the contravention of any of the provisions of the last foregoing section with respect to allotment he shall be liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages, or costs shall not be commenced after the expiration of two years from the date of the allotment.

87. (1) A company shall not commence any business or exercise any borrowing powers unless—

Restrictions on
commencement
of business.

- (a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and
- (b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription, or in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and
- (c) there has been filed with the registrar of companies a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with; and
- (d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar of companies a statement in lieu of prospectus.

(2.) The registrar of companies shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3.) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4.) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5.) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding fifty pounds for every day during which the contravention continues.

(6.) Nothing in this section shall apply to a private company, or to a company registered before the first day of January nineteen hundred and one, or to a company registered before the first day of July nineteen hundred and eight which does not issue a prospectus inviting the public to subscribe for its shares.

Return as to allotments.

88. (1) Whenever a company limited by shares makes any allotment of its shares, the company shall within one month thereafter file with the registrar of companies—

- (a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and
- (b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2.) Where such a contract as above mentioned is not reduced to writing, the company shall within one month after the allotment file with the registrar of companies the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and those particulars shall be deemed to be an instrument within the meaning of the Stamp Act, 1891, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section twelve of that Act.

(3.) If default is made in complying with the requirements of this section, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds for every day during which the default continues:

Provided that, in case of default in filing with the registrar of companies within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the court for relief, and the court, if satisfied that the omission to file the document was accidental or due to inadvertence or that it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such period as the court may think proper.

Commissions and Discounts.

89. (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised,

Power to pay certain commissions and prohibition of payment of all other commissions, discounts, &c.

and if the amount or rate per cent of the commission paid or agreed to be paid is—

- (a) In the case of shares offered to the public for subscription, disclosed in the prospectus; or
- (b) In the case of shares not offered to the public for subscription disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar of companies, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2.) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3.) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

90. Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed, or so much thereof as has not been written off, shall be stated in every balance sheet of the company until the whole amount thereof has been written off.

Statement
in balance
sheet as to
commissions
and discounts.

Information as to Mortgages, Charges, &c.

93. (1) Every mortgage or charge created after the first day of July nineteen hundred and eight by a company registered in England or Ireland and being either—

Registration
of mortgages
and charges
in England
and Ireland.

- (a) a mortgage or charge for the purpose of securing any issue of debentures; or
- (b) a mortgage or charge on uncalled share capital of the company; or
- (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or
- (d) a mortgage or charge on any land, wherever situate, or any interest therein; or
- (e) a mortgage or charge on any book debts of the company; or
- (f) a floating charge on the undertaking or property of the company.

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any), by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable:

Provided that—

- (i) in the case of a mortgage or charge created out of the United Kingdom comprising solely property situate outside the United Kingdom, the delivery to and the receipt by the registrar of a copy of the instrument by which the mortgage or charge is created or evidenced, verified in the prescribed manner, shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom, shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be delivered to the registrar; and
- (ii) where the mortgage or charge is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create the mortgage or charge may be sent for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and
- (iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purpose of this section be treated as a mortgage or charge on those book debts; and
- (iv) the holding of debentures entitling the holder to a charge on land shall not be deemed to be an interest in land.

(2.) The registrar shall keep, with respect to each company, a register in the prescribed form of all the mortgages and charges created by the company after the first day of July nineteen hundred and eight and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgage or charged, and the names of the mortgagees or persons entitled to the charge.

(3.) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it shall be sufficient if there are delivered to or received by the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:

- (a) the total amount secured by the whole series; and
 - (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and
 - (c) a general description of the property charged; and
 - (d) the names of the trustees, if any, for the debenture holders;
- together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(4.) Where any commission, allowance, or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent of the commission, discount, or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

(5.) The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with.

(6.) The company shall cause a copy of every certificate or registration given under this section to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this subsection shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

(7.) It shall be the duty of the company to send to the registrar for registration the particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under this section, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(8.) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one shilling for each inspection.

(9.) Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under this section to be kept at the registered office of the company:

Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

Registration
of enforcement
of security.

94. (1) If any person obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such a receiver or manager under any powers contained in any instrument, he shall within seven days from the date of the order or of the appointment under the powers contained in the instrument give notice of the fact to the registrar of companies, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

(2.) If any person makes default in complying with the requirements of this section he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

Filing of
accounts of
receivers and
managers.

95. (1) Every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall, once in every half year while he remains in possession, and also on ceasing to act as receiver or manager, file with the registrar of companies an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as receiver or manager file with the registrar notice to that effect, and the registrar shall enter the notice in the register of mortgages and charges.

(2.) Every receiver or manager who makes default in complying with the provisions of this section shall be liable to a fine not exceeding fifty pounds.

Rectification of
register of
mortgages.

96. A judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge, just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified.

Entry of
satisfaction.

97. The registrar of companies may, on evidence being given to his satisfaction that the debt for which any registered mortgage or charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and shall if required furnish the company with a copy thereof.

Index to
register of
mortgages
and charges.

98. The registrar of companies shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act.

99. (1) If any company makes default in sending to the registrar of companies for registration the particulars of any mortgage or charge created by the company, and of the issues of debentures of a series, requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every director, manager, secretary, or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds for every day during which the default continues. Penalties.

(2.) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company and every director, manager, and other officer of the company, who knowingly and wilfully authorised or permitted the default shall, without prejudice to any other liability, be liable on summary conviction to a fine not exceeding one hundred pounds.

(3.) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable on summary conviction to a fine not exceeding one hundred pounds.

100. (1) Every limited company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto. Company's register of mortgages.

(2.) If any director, manager, or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding fifty pounds.

101. (1) The copies of instruments creating any mortgage or charge requiring registration under this Act with the registrar of companies, and the register of mortgages kept in pursuance of the last foregoing section, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe. Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.

(2.) If inspection of the said copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorising or knowingly and wilfully permitting the refusal, shall be liable to a fine not exceeding five pounds, and a further fine not exceeding two pounds for every day during which the refusal continues; and, in addition to the above penalty as respects companies registered in England and Ireland, any judge of the High Court sitting in chambers, or the judge of the court exercising the stannaries jurisdiction, in the case of companies subject to that jurisdiction, may by order compel an immediate inspection of the copies or register.

Right of debenture holders to inspect the register of debenture holders and to have copies of trust deed.

102. (1) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of sixpence for every one hundred words required to be copied.

(2.) A copy of any trust deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust deed of the sum of one shilling or such less sum as may be prescribed by the company, or, where the trust deed has not been printed, on payment of sixpence for every one hundred words required to be copied.

(3.) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding five pounds, and to a further fine not exceeding two pounds for every day during which the refusal continues, and every director, manager, secretary, or other officer of the company who knowingly authorises or permits the refusal shall incur the like penalty.

Debentures and Floating Charges.

Perpetual debentures.

103. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

Power to re-issue redeemed debentures in certain cases.

104. (1) Where either before or after the passing of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such a re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2.) Where with the object of keeping debentures alive for the purpose of re-issue they have either before or after the passing of this Act been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purpose of this section.

(3.) Where a company has either before or after the passing of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4.) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the passing of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued.

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty of any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp duty and penalty.

(5.) Nothing in this section shall prejudice—

- (a) The operation of any judgment or order of a court of competent jurisdiction pronounced or made before the seventh day of March, nineteen hundred and seven as between the parties to the proceedings in which the judgment was pronounced or the order made, and any appeal from any such judgment or order shall be decided as if this Act had not been passed; or
- (b) Any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

105. A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

Specific performance of contract to subscribe for debentures.

106. Notwithstanding anything contained in the statute of the Scots Parliament of 1696, chapter twenty-five, debentures to bearer issued in Scotland are declared to be valid and binding according to their terms.

Validity of debentures to bearer in Scotland.

Inspection and Audit.

109. (1) The Board of Trade may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Board direct—

Investigation of affairs of company by Board of Trade inspectors.

- (i) In the case of a banking company having a share capital, on the application of members holding not less than one third of the shares issued:
- (ii) In the case of any other company having a share capital, on the application of members holding not less than one tenth of the shares issued:
- (iii) In the case of a company not having a share capital, on the application of not less than one fifth in number of the persons on the company's register of members.

(2.) The application shall be supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring, the investigation; and the Board of Trade may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

(3.) It shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.

(4.) An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.

(5.) If any officer or agent refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding five pounds in respect of each offence.

(6.) On the conclusion of the investigation the inspectors shall report their opinion to the Board of Trade, and a copy of the report shall be forwarded by the Board to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation be delivered to them.

The report shall be written or printed, as the Board direct.

(7.) All expenses of and incidental to the investigation shall be defrayed by the applicants, unless the Board of Trade direct the same to be paid by the company, which the Board is hereby authorised to do.

Power of company to appoint inspectors.

110. (1) A company may by special resolution appoint inspectors to investigate its affairs.

(2.) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Board of Trade, except that, instead of reporting to the Board they shall report in such manner and to such persons as the company in general meeting may direct.

(3.) Officers and agents of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Board of Trade.

Report of inspectors to be evidence.

111. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

Appointment and remuneration of auditors.

112. (1) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(2.) If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(3.) A director or officer of the company shall not be capable of being appointed auditor of the company.

(4.) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the company not less than fourteen days before the annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the shareholders, either by advertisement or in any other mode allowed by the articles, not less than seven days before the annual general meeting:

Provided that if, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required by this provision, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this provision, be sent or given at the same time as the notice of the annual general meeting.

(5.) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at that meeting may appoint auditors.

(6.) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act.

(7.) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

113. (1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company. and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors. Powers and duties of auditors.

(2.) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state—

- (a) Whether or not they have obtained all the information and explanations they have required; and
- (b) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(3.) The balance sheet shall be signed on behalf of the board by two of the directors of the company or, if there is only one director, by that director, and the auditor's report shall be attached to the balance sheet, or there shall be inserted at the foot of the balance sheet a reference to the report, and the report shall be read before the company in general meeting, and shall be open to inspection by any shareholder.

Any shareholder shall be entitled to be furnished with a copy of the balance sheet and auditors' report at a charge not exceeding sixpence for every hundred words.

(4.) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated, or published, or if any copy of a balance sheet is issued, circulated, or published without either having a copy of the auditors' report attached thereto or containing such reference to that report as is required by this section, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds.

(5.) In the case of a banking company registered after the fifteenth day of August eighteen hundred and seventy-nine—

- (a) if the company has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom; and
- (b) the balance sheet must be signed by the secretary or manager (if any), and where there are more than three directors of the company by at least three of those directors, and where there are not more than three directors by all the directors.

Meaning of 'Private Company.'

Meaning of
"private
company."

121. (1) For the purposes of this Act the expression 'Private company' means a company which by its articles—

- (a) restricts the right to transfer its shares; and
- (b) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and
- (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(2.) A private company may, subject to anything contained in the memorandum or articles, by passing a special resolution and by filing with the registrar of companies such a statement in lieu of prospectus as the company, if a public company, would have had to file before allotting any of its shares or debentures, together with such a statutory declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.

(3.) Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single member.

APPENDIX U.
STATE OF NEW JERSEY.

CHAPTER 15.—LAWS, 1913.

A further supplement to an act entitled 'An act concerning corporations (Revision of 1896),' approved April twenty-first, one thousand eight hundred and ninety-six, for the purpose of amending section forty-nine thereof.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section forty-nine of the act entitled 'An act concerning corporations (Revision of 1896),' be and the same is hereby amended so as to read as follows:

49. (1) Any corporation formed under this act may purchase property, real and personal, and the stock of any corporation, necessary for its business, and issue stock to the amount of the value thereof in payment therefor, subject to the provisions hereinafter set forth, and the stock so issued shall be full paid stock, and not liable to any further call; and said corporation may also issue stock for the amount it actually pays for labor performed.

Provided, that when property is purchased the purchasing corporation must receive in property or stock what the same is reasonably worth in money at a fair *bona fide* valuation; and provided further, that no fictitious stock shall be issued; that no stock shall be issued for profits not yet earned, but only anticipated; and provided further, that when stock is issued on the basis of the stock of any other corporation it may purchase, no stock shall be issued thereon for an amount greater than the sum it actually pays for such stock in cash or its equivalent; and provided further, that the property purchased or the property owned by the corporation whose stock is purchased shall be cognate in character and use to the property used or contemplated to be used by the purchasing corporation in the direct conduct of its own proper business; and in all cases when stock is to be issued for property purchased, or for the stock of other corporations purchased, a statement in writing, signed by the directors of the purchasing company or by a majority of them, shall be filed in the office of the Secretary of State, showing what property has been purchased, and what stock of any other corporation has been purchased, and the amount actually paid therefor.

(2) That if any certificate made in pursuance of this act shall be false in any material representation, all the officers who sign the same, knowing it to be false, shall be guilty of misdemeanor, and the directors, officers and agents of the corporation, who wilfully participate in making it, shall be guilty of misdemeanor. And provided further, that any corporation which shall purchase the stock of any other corporation, or any property, for the purpose of restraining trade or commerce, or acquiring a monopoly, and the directors thereof participating therein, shall be guilty of a misdemeanor.

2. This act shall take effect immediately.

Approved February 19, 1913.

CHAPTER 16.—LAWS, 1913.

An act to amend an act entitled "A further supplement to the act entitled 'An act for the punishment of crimes,' approved June fourteenth, one thousand eight hundred and ninety-eight (Revision of 1898)," which supplement was approved June second, one thousand nine hundred and five.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section one of the act entitled "A further supplement to the act entitled 'An act for the punishment of crimes,' approved June fourteenth, one thousand eight hundred and ninety-eight (Revision of 1898)," which supplement was approved June second, one thousand nine hundred and five, be and the same is hereby amended so as to read as follows:

1. Any person or persons, who shall organize, or incorporate, or procure to be organized, or incorporated, any corporation or body politic, under the laws of this State, with intent thereby to further promote or conduct any object which is fraudulent or unlawful under the laws of this State, or which is intended to be used in restraint of trade or in acquiring a monopoly, when such corporation or body politic engages in interstate or intrastate commerce, shall be guilty of a misdemeanor.

2. Section two of said supplement shall be and the same is hereby amended so as to read as follows:

2. Any person, or persons, being officers, directors, managers or employees of any corporation or body politic, incorporated under the laws of this State, who shall wilfully use, operate or control said corporation or body politic, or suffer the same to be used for the furtherance or promotion of any object fraudulent or unlawful under the laws of this State, or who shall use the same directly or indirectly in restraint of trade or in acquiring a monopoly, when such corporation or body politic engages in interstate or intrastate commerce, shall be guilty of a misdemeanor.

3. If any part or parts of this act shall be declared to be invalid or unconstitutional, the other parts hereof shall not thereby be affected or impaired.

4. This act shall take effect immediately.

Approved February 19, 1913.

CHAPTER 17.—LAWS, 1913.

An act to amend section one hundred and nine of an act entitled 'An act concerning corporations (Revision of 1896),' approved April twenty-first, one thousand eight hundred and ninety-six.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section one hundred and nine of the act entitled 'An act concerning corporations (Revision of 1896),' be and the same is hereby amended so as to read as follows:

109. When two or more corporations are merged or consolidated the consolidated corporation shall have power and authority to issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make or obligations it will be required to assume, in order to effect such merger or consolidation; to secure the payment of which bonds or obligations it shall be lawful to mortgage its corporate franchises, rights, privileges and property, real, personal and mixed; Provided, such bonds shall not bear a greater rate of interest than six per centum per annum; the consolidated corporation may issue capital stock, either common or preferred, or both, to such an amount as may be necessary, to the stockholders of such merging or consolidating corporations in exchange or payment for their original shares, in the manner and on the terms specified in the agreement of merger, or consolidation, which may fix the amount and pro-

vide for the issue of preferred stock based on the property or stock of the merging or consolidating corporations conveyed to the consolidated corporations, as well as upon money capital paid in.

2. This act shall take effect immediately.

Approved February 19, 1913.

CHAPTER 18.—LAWS, 1913.

An act to amend an act entitled 'An act concerning corporations (Revision of 1896),' approved April twenty-first, eighteen hundred and ninety-six.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section fifty-one of the act referred to in the title of this act is hereby amended to read as follows:

51. No corporation heretofore organized or hereafter to be organized under the provisions of the act to which this is an amendment, or the amendments thereof or supplements thereto, except as otherwise provided therein or thereby, shall hereafter purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the corporate stock of any other corporation or corporations of this or any other State, or of any bonds, securities or other evidence of indebtedness created by any other corporation or corporations of this or any other State, nor as owner of such stock exercise any of the rights, powers and privileges of ownership, including the right to vote thereon. Provided, that nothing herein contained shall operate to prevent any corporation or corporations from acquiring the bonds, securities or other evidences of indebtedness created by any non-competing corporation in payment of any debt or debts due from any such non-competing corporation; nor to prevent any corporation or corporations created under the laws of this State from purchasing as a temporary investment out of its surplus earnings, reserved under the provisions of this act, as a working capital, bonds, securities or evidence of indebtedness created by any non-competing corporation or corporations of this or any other State, or from investing in like securities any funds held by it for the benefit of its employees or any funds held for insurance, rebuilding or depreciating purposes; nor to prevent any corporation or corporations created under the laws of this State from purchasing the bonds, securities or other evidences of indebtedness created by any corporation the stock of which may lawfully be purchased under the authority given by section forty-nine of the act entitled 'An act concerning corporations (Revision of 1896);' provided, also, that nothing herein contained shall be held to affect or impair any right heretofore acquired in pursuance of the section hereby amended, by any corporation created under the laws of this State.

2. All acts and parts of acts inconsistent herewith are hereby repealed, and this act shall take effect immediately.

Approved February 19, 1913.

CHAPTER 19.—LAWS, 1913.

A further supplement to an act entitled 'An act concerning corporations (Revision of 1896),' approved April twenty-first, one thousand eight hundred and ninety-six.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. A merger of corporations made under the provisions of the act to which this act is a supplement, shall not in any manner impair the rights of any creditor of either of the merged corporations.

2. Before any merger of corporations can be made, the approval thereof in writing by the Board of Public Utility Commissioners of this State shall be obtained by said corporations and filed in the office of the Secretary of State, with the names of the directors of each of said corporations which assent to the merger.

3. Every corporation, and the directors thereof, procuring or assenting to such merger without complying with the provisions hereinbefore contained, shall be guilty of a misdemeanor and punishable accordingly.

4. This act shall take effect immediately.

Approved February 19, 1913

APPENDIX V.

LAWS OF THE STATE OF NEW YORK, 1912.

CHAPTER 351.

An act to amend the stock corporation law, in relation to corporations having shares of capital stock without nominal or par value.

Became a law April 15, 1912, with the approval of the Governor.

Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article two of chapter sixty-one of the laws of nineteen hundred and nine, entitled 'An act relating to stock corporations, constituting chapter fifty-nine of the consolidated laws,' is hereby amended by adding at the end of said article five new sections, to be sections nineteen, twenty, twenty-one, twenty-two and twenty-three of such chapter, to read respectively as follows:

19. Issuance of shares of stock without nominal or par value. Upon the formation or the reorganization of any stock corporation, other than a moneyed corporation, and other than a corporation under the jurisdiction of any public service commission, the certificate of incorporation may provide for the issuance of the shares of stock of such corporation, other than preferred stock having a preference as to principal, without any nominal or par value by stating in such certificate:

(1). The number of shares that may be issued by the corporation, and if any of such shares be preferred stock, the preferences thereof. If such preferred stock or any part thereof shall have a preference as to principal, the certificate shall state the amount of such preferred stock having such preference, the particular character of such preferences, and the amount of each share thereof, which shall be five dollars or some multiple of five dollars, but not more than one hundred dollars.

(2). The amount of capital with which the corporation will carry on business, which amount shall be not less than the amount of preferred stock (if any) authorized to be issued with a preference as to principal, and in addition thereto a sum equivalent to five dollars or to some multiple of five dollars for every share authorized to be issued other than such preferred stock; but in no event shall the amount of such capital be less than five hundred dollars.

Such statements in the certificate shall be in lieu of any statements prescribed by the law under which the corporation shall have been formed or reorganized as to the amount or the maximum amount of its capital stock or the number of shares into which the same shall be divided, or of the amount or the par value of such shares.

Each share of such stock without nominal or par value shall be equal to every other share of such stock, subject to the preferences given to the preferred stock if any authorized to be issued. Every certificate for such shares without nominal or par value shall have plainly written or printed upon its face the number of such *shares which it represents and the number of such shares which the corporation is authorized to issue, and no such certificate shall express any nominal or par value of such shares. The certificates for preferred shares having a preference as to principal shall state briefly the amount which the holders of each of such preferred shares shall be entitled to receive on account of principal from the surplus assets of the corporation in preference to the holders of other shares, and shall state briefly any other rights or preferences given to the holders of such shares.

Such corporation may issue and may sell its authorized shares, from time to time, for such consideration as may be prescribed in the certificate of incorporation, or as from time to time may be fixed by the board of directors pursuant to authority conferred in such certificate, or if such certificate shall not so provide, then by the consent of the holders of two-thirds of each class of shares then outstanding given at a meeting called for that purpose in such manner as shall be prescribed by the by-laws. Any and all shares issued as permitted by this section shall be deemed fully paid and non-assessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereof.

20. Commencement of business; authorized debts. No corporation formed pursuant to section nineteen hereof shall begin to carry on business or shall incur any debts until the amount of capital stated in its certificate of incorporation shall have been fully paid in money, or in property taken at its actual value. In case the amount of capital stated in its certificate of incorporation shall be increased as herein provided, such corporation shall not increase the amount of its indebtedness then existing until it shall have received in money or property the amount of such increase of its stated capital. The directors of the corporation assenting to the creation of any debt in violation of this section shall be liable jointly and severally for such debt; but no action shall be brought under the foregoing provision of this section unless within one year after the debt shall have been incurred the creditor shall have served upon the director written notice of intention to hold him personally liable for such debt. Any director who, because of any such liability under this section, shall pay any debt of the corporation, shall be subrogated to all rights of the creditor in respect thereof against the corporation and its property and also shall be entitled to contribution from all other directors of the corporation similarly liable for the same debt and the personal representative of any such director who shall have died before making such contribution.

No such corporation shall declare any dividend which shall reduce the amount of its capital below the amount stated in the certificate as the amount of capital with which the corporation will carry on business. In case any such dividend shall be declared, the directors in whose administration the same shall have been declared,

*so in original

except those who may have caused their dissent therefrom to be entered upon the minutes of such directors at the time or who were not present when such action was taken, shall be liable jointly and severally to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or by its creditors respectively by reason of such dividend.

21. Taxation. The organization tax payable under section one hundred and eighty,¹ of the tax law by any corporation issuing such shares without designated monetary value shall be at the rate of five cents on each such share which the corporation is authorized to issue, and a like tax upon any subsequent increase thereof. The tax payable under section two hundred and seventy of the tax law in respect of any sale or agreement of sale or any memorandum of sale or delivery or transfers of shares or certificates of any share without designated monetary value hereafter issued by any such corporation issuing such shares shall be at the rate of two cents for each and every share of such stock so transferred. The franchise tax upon any corporation issuing such shares of stock payable under section one hundred and eighty-two of the tax law shall be determined by the amount of the gross assets of such corporation employed in any business within this state, less such proportion of its liabilities as shall represent the ratio of its gross assets employed in any business within this state to its entire gross assets wherever employed in business, and the rate of such franchise tax shall be fixed in the manner provided in said section one hundred and eighty-two of the tax law. For this purpose the rate of dividends shall be computed by dividing the total amount of dividends which have been paid during the year by the amount of assets of the corporation upon the first day of such year.

22. Increase or reduction of shares or capital. Any corporation formed or reorganized pursuant to section nineteen may amend its certificate of incorporation so as to increase or to reduce the number of shares which it may issue, or so as to increase or to reduce the amount of its stated capital, by filing, in the manner provided for the original certificate of incorporation, a certificate of amendment under seal executed by its president or a vice-president and by its secretary or its treasurer, stating the amendment proposed and that the same has been duly authorized by a vote of a majority of the directors and also by the vote of the holders of at least three-fifths of the outstanding shares of each class issued by the corporation, at a meeting of the stockholders called for the purpose in the manner provided in section sixty-three hereof, and by filing with such certificate of amendment a copy of the proceedings of such meeting, made, signed, verified and acknowledged by the president or a vice-president and by the secretary or the treasurer of the corporation; but an amendment cannot be made under this section unless as so amended the certificate of incorporation could lawfully have been filed under section nineteen of this chapter. In case of a reduction of the amount of capital of a corporation, a certificate setting forth the whole amount of the ascertained debts and liabilities of the corporation shall be made, signed, verified and acknowledged by the president or a vice-president and by the secretary or the treasurer of the corporation and shall be filed with the certificate of amendment; and such certificate of amendment shall have endorsed thereon the approval of the comptroller to the effect that as so stated the reduced amount of capital is sufficient for the proper purposes of the corporation and is in excess of its ascertained debts and liabilities.

23. Amount of capital stock and of shares within meaning of other laws. For the purpose of any rule of law or of any statutory provision (other than the foregoing sections nineteen, twenty, twenty-one and twenty-two) relating to the amount of the capital stock of a corporation or the amount or par value of its shares, the

¹As amended by L. 1910, ch. 472, and L. 1911, ch. 91.

aggregate amount of the capital stock of any such corporation formed pursuant to section nineteen hereof shall be deemed to be the aggregate amount specified in the certificate or amended certificate of incorporation or of reorganization as the amount of capital with which the corporation will carry on business; the amount or the par value of each share of preferred stock having a preference as to principal shall be deemed to be the amount thereof so specified in such certificate or such amended certificate; and the amount or the par value of each other share shall be deemed to be an aliquot part of the aggregate capital so specified in such certificate or in such amended certificate in excess of the specified amount (if any) of the preferred stock therein authorized to be issued with a preference as to principal.

2. This act shall take effect immediately.

BUFFALO, 28th January, 1909.

To the New York State Bar Association:—

The undersigned, being the Special Committee on Corporation Law, unanimously submit this report in pursuance of the resolution adopted by the Association in January, 1908, by which the Committee was directed to prepare and to cause to be presented to the Legislature for adoption amendments to the Corporation Laws, permitting the formation of corporations having capital stock divided into shares without assignment thereto of any value in money, and the issue of stock certificates representing merely proportionate interests in the entire capital stock without the indication of any nominal or par value in money.

The Appendix contains our draft of a statute to amend the Business Corporation Law of the State, by adding five new sections to be numbered 18, 19, 20, 21 and 22. The amendment provides for the formation—without requirement of money denomination for their shares of capital stock—of business corporations, other than those for banking, insurance, railroad, transportation and educational purposes. But, in other respects, it does not provide for the new class of business corporations any power which does not now belong to, or rest upon, stock corporations. If adopted, it will invest such business corporations and no others with the right or privilege to issue shares of stock (other than preferred stock) without that fixed money valuation which has led to the abuses of nominal, as distinguished from actual, capitalization.

Under the existing law a corporation may be formed with an authorized capital divided into shares of \$5 each and may commence business with \$500. Under the proposed law a corporation cannot begin to carry on business or incur any debt until it shall have on hand in money or in property taken at its cash value at least \$10,000 and equal to the amount of preferred stock which it may issue and not less than \$5 in respect of every other share. A corporation under the proposed law, therefore, must have definite and substantial amount of capital before it can do business or incur any debt, and this actual capital must be indicated in the certificate of incorporation. The share capital is to have no nominal or par value and is not held out to the public as an indication of the actual capital of the corporation.

For the new class of business corporations it is proposed that:—

1. The certificate of incorporation shall set forth what is usually required for business corporations, except that, with respect to the capital and shares, it shall state—

(a) That the incorporators desire to form a corporation having a capital stock divided into shares without nominal or par value thereof.

(b) The number of shares to be issued, and, if there is to be preferred stock with a preference as to principal, then the number of preferred shares and the amount of the preferred stock and of each share thereof.

(c) The minimum amount of capital, to be not less than \$10,000 and not less than the amount of the preferred stock having a preference as to principal and in addition \$5 for every other share authorized to be issued.

2. No certificate for shares not preferred as to principal shall express any nominal or par value in respect of any such share.

3. The organization tax shall be based upon the minimum capital with which the corporation will carry on business, and upon any increase thereof.

4. No such corporation shall begin to carry on business or shall incur any debt until the minimum amount of capital specified in the certificate of incorporation shall have been paid in money or in property taken at its cash value.

5. The board of directors of the corporation may issue and sell its non-assessable shares at any price or prices and on any terms that may be authorized by the certificate of incorporation or that may be fixed from time to time by the board of directors or the board of directors and stockholders pursuant to authority conferred in the certificate of incorporation, or if such certificate shall not so provide then by the consent of the holders of two-thirds of each class of shares then outstanding given at a meeting called for that purpose in such manner as shall be prescribed by the by-laws.

While, in late years, American corporations, including those of which the capital is drawn chiefly from New York sources or that in reality are organized for the doing of New York business, have been formed under the laws of other States, particularly the State of New Jersey, and this to an extent so large as to give rise to a perfectly natural jealousy on the part of our own State—none the less, and even for companies organized in other States, New York remains the financial centre of the country. The financial administration of the business and industrial enterprises and interests of the United States, and, indeed, of the world, is a concern of our State to an extent very far beyond that of any other State. Therefore, we may well lead the way in a change which, in our opinion, is fitted not only to avoid corporate abuses, but also to prevent the misunderstanding or disparagement of such corporations as conduct their business in solid, straight-forward, law-abiding fashion.

Perhaps the very strongest impression today of unfair corporate organization has arisen from so-called 'over-capitalization.' About this, it has been felt that there has been, or, at least, seemed to be, an element of misrepresentation or even deceit. Sales on the Stock Exchange or other market of common shares immediately after the companies have been launched made at a small percentage of nominal par (and theoretically real) value, have afforded or, at least, have seemed to afford, some reason for this wide-spread belief, even though the deception or misleading of investors by stock-watering may have been greatly exaggerated. This popular verdict, whatever its justification, is injurious to corporations and investors and to legitimate business interests.

The abolition of the money denomination of shares would, we believe, deprive those who promote corporations of the advantages, real or seeming, of that exaggerated capitalization, which undoubtedly is possible under the existing laws of every or nearly every American State; and, at the same time, it would compel investors to fix their attention upon actual value, free of the influence of what, as overwhelming experiences shows, tends to become nominal or symbolic valuation. We would have the truth recognized, without the misleading effect of such valuations, that a common share of stock of a corporation represents neither more nor less than a certain aliquot part, a one-thousandth or one-millionth or other fraction, according to the number of common shares of the net value of the enterprise over and above all debts and stock preferences. If promoters or directors wish to assert a money valuation for their shares, this amendment would not prevent them from doing so in such manner as would secure the confidence of their creditors; but, they ought to be compelled to do that directly, and thereafter be rigorously held to make their representations good.

Our proposed measure would in no way effect the requirements of law with reference to taxation. The bill provides an organization tax on the same basis as at present.

The amendment will not apply to business corporations now existing nor to those formed under existing statutes, except, of course, as they shall alter their certificates of incorporation as permitted by Section 32 of the Stock Corporation Law.

Respectfully submitted.

FRANCIS LYNDE STETSON,

Chairman.

EDWARD M. SHEPARD,

VICTOR MORAWETZ,

Committee.

CERTIFICATE OF INCORPORATION OF THE WISCONSIN EDISON COMPANY, INCORPORATED.

We, the undersigned, all being of full age and at least two-thirds being citizens of the United States of America and at least one being a resident of the state of New York, desiring to form a corporation pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby certify:

First: The name of the proposed corporation is the WISCONSIN EDISON COMPANY, INCORPORATED.

Second: The purposes for which it is to be formed are as follows:

To acquire by purchase, subscription, or otherwise and to invest in, hold for investment or otherwise, and to trade and deal in and to use, sell, pledge or otherwise dispose of the stock, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations, and while owner of any such stocks, bonds, and other evidences of indebtedness to exercise all the rights, powers and privileges of ownership, including the right to vote thereon for any and all purposes; to aid by loan, subsidy, guaranty or in any other manner whatsoever, so far as the same may be permitted in the case of corporations organized under the Business Corporations Law, any corporation whose stocks, bonds, securities or other obligations are in any manner held or guaranteed, and to do any and all other acts or things for the preservation, protection, improvement or enhancement in value of any such stocks, bonds, securities or other obligations; and to do all and any such acts or things designed to accomplish any such purpose.

To acquire, hold, own, dispose of and generally deal in grants, concessions, franchises and contracts of every kind; to cause to be formed, to promote and to aid in any way in the formation of any corporation, domestic or foreign.

To act as financial or business agent for domestic and foreign corporations, individuals, partnerships, associations, states, governments or other bodies.

To borrow money, to issue bonds, debentures, notes and other obligations, secured or unsecured, of the corporation, from time to time, for moneys borrowed, or in payment for property acquired, or for any of the other subjects or purposes of the corporation, or for any of the objects of its business; to secure the same by mortgage or mortgages, or deed or deeds of trust, or pledge or other lien upon any or all of the property, rights, privileges or franchises of the corporation, wherever situated acquired or to be acquired; to confer upon the holders of any debentures or other bonds of the corporation, secured or unsecured, the right to convert the principal thereof into preferred or common stock of the corporation upon such terms and conditions as shall be fixed by the Board of Directors; to sell, pledge or otherwise dispose of any or all debentures or other bonds, notes and other obligations in such manner

and upon such terms as the Board of Directors may deem judicious; and to guarantee the payment of any dividends upon stocks, or the principal or interest upon bonds, or the contracts or other obligations of any corporation or individual, so far as the same may be permitted in the case of corporations organized under the Business Corporations Law.

To construct its business and all or any of its branches, so far as permitted by law in the State of New York and in other states of the United States of America and in the territories and the District of Columbia and in any and all dependencies, colonies or possessions of the United States of America and foreign countries; and for and in connection with such business to hold, possess, purchase, mortgage and convey real and personal property, and to maintain offices and agencies either within or anywhere without the State of New York.

In general to do any and all things and exercise any and all powers which may now or hereafter be lawful for the corporation to do or exercise under and in pursuance of the Business Corporations Law of the State of New York, or of any other law that may be now or hereafter applicable to the corporation.

Third: The number of shares of capital stock that may be issued by said corporation is Three hundred thousand (300,000), of which one hundred thousand (100,000) of the amount or par value of one hundred dollars (\$100) each are to be preferred stock, and two hundred thousand (200,000) which shall have no nominal or par value are to be common stock.

Fourth: The holders of the preferred stock shall be entitled to cumulative dividends thereon at the rate of six dollars (\$6) per share or six per centum of the amount or par value for each and every fiscal year of the life of the corporation and no more, payable out of any and all surplus or net profits, quarterly half-yearly, or yearly as and when declared by the Board of Directors, before any dividends shall be declared, set apart for, or paid upon the common stock of the corporation. Said dividends on the preferred stock shall be cumulative, so that if the corporation shall fail in any fiscal year to pay such dividends on all of the issued and outstanding preferred stock, such deficiency in the dividends shall be fully paid, but without interest, before any dividends shall be paid or set apart on the common stock. Subject to the foregoing provisions said preferred stock shall not be entitled to participate in any other or additional earnings or profits of the corporation.

In the event of the dissolution or liquidation of the corporation, or a sale of all its assets (whether voluntary or involuntary) or in event of its insolvency or upon any distribution of its capital, there shall be paid to the holders of the preferred stock the par value thereof, to wit, one hundred dollars (\$100) per share and the amount of all unpaid accrued dividends thereon, before any sum shall be paid or any assets distributed among the holders of the common stock; and after the payment to the holders of the preferred stock of its par value and the unpaid accrued dividends thereon, the remaining assets and funds of the corporation shall be divided among and paid to the holders of the common stock according to their respective shares.

The Board of Directors may in their discretion declare and pay dividends on the common stock concurrently with dividends on the preferred stock, for any dividend period of any fiscal year when such dividends are applicable to the common stock; provided that all accumulated dividends on the preferred stock for all previous fiscal years and all dividends on the preferred stock for previous dividend periods for that fiscal year shall have been paid in full.

The whole of the preferred stock may be redeemed on any dividend day at the option of the Board of Directors, upon sixty (60) days' notice by mail to the holders of record of such stock as may be prescribed by the by-laws or, in the absence of any by-law upon the subject, by resolution of its Board of Directors, by paying for each share of the preferred stock one hundred and fifteen dollars (\$115) in cash, and in addition thereto all unpaid dividends accrued thereon at the date fixed for such redemption.

From time to time the preferred stock and the common stock may be increased according to law and may be issued in such amounts and proportions as shall be determined by the Board of Directors and as may be prescribed by law.

Fifth: The amount of capital with which the corporation will carry on business is twelve million dollars (\$12,000,000).

Sixth: The corporation may issue and may sell its authorized shares from time to time for such consideration as may from time to time be fixed by the Board of Directors, and the consideration so fixed for shares of the preferred stock may be either greater or less than their par value.

Seventh: The principal business office of the corporation is to be located in the Borough of Manhattan, City, County and State of New York.

Eighth: The duration of the corporation is to be perpetual.

Ninth: The number of its directors is to be nine. Three directors shall be elected in each year, and the term of office of each director, except as provided in the next section hereof, shall be three years or until his successor shall be chosen.

Tenth: The names and post office addresses of the directors for the first year and the term of office of each are as follows:

Names.	Addresses.
(To serve until the first annual meeting).	
Henry H. Pierce.	49 Wall Street, New York, N.Y.
Edward H. Green.	49 Wall Street, New York, N.Y.
Frederick H. Piske.	30 Broad Street, New York, N.Y.

(To serve until the second annual meeting).

James D. Mortimer.	30 Broad Street, New York, N.Y.
John Foster Dulles.	49 Wall Street, New York, N.Y.
Thomas H. Ryan.	30 Broad Street, New York, N.Y.

(To serve until the third annual meeting).

James Campbell.	30 Broad Street, New York, N.Y.
John K. Byard.	49 Wall Street, New York, N.Y.
Emerson D. Pray.	30 Broad Street, New York, N.Y.

Eleventh: The names and post office addresses of the subscribers to this certificate, and the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Addresses.	No. of shares.
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Here follows names and addresses of subscribers.

Twelfth: No preferred stockholder shall be entitled to subscribe for, purchase, or receive any part of any new or additional issue of stock, or of any issue of bonds or debentures convertible into stock.

The Board of Directors may appoint an Executive Committee from among their number, which Committee, to the extent provided in the By-laws of the Corporation, shall have and may exercise all of the powers of the Board of Directors in the man-

agement of the business and affairs of the corporation during the intervals between the meetings of the Board of Directors so far as may be permitted by law.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate this 4th day of November, 1912.

Here follows names of subscribers.

